

# The Opera House may again hear the sound of music

Historic landmark is slated for renovation and use as cultural and recreational center

In 1900 the railroad's arrival in

Pocahontas County, West Virginia, opened vast stands of virgin timber to commercial markets. The advent of rail travel and commerce also opened the county's isolated communities to all the activity and opportunity that followed the rail.

By 1909 J.G. Tilton, publisher of *The Marlinton Messenger*, had opened The Opera House as a venue for the rapidly increasing number of cultural and sporting events.

Productions from New York and elsewhere were staged in The Opera House as well as performances by local entertainers and moving picture shows. The Opera House was home court to Marlinton's private basketball team and was used as a roller skating rink.

The immense exterior walls of the Victorian building were constructed of concrete reinforced with rails forged to carry heavy logging trains. It is the oldest reinforced concrete structure in West Virginia and is



*Pictured is one corner of the balcony with its solid walnut balustrade. The building was used as a warehouse for a local store before being acquired by Pocahontas County Historic Landmarks Commission for restoration as a cultural and recreational center. The first phase of renovations will focus on the building's exterior.*

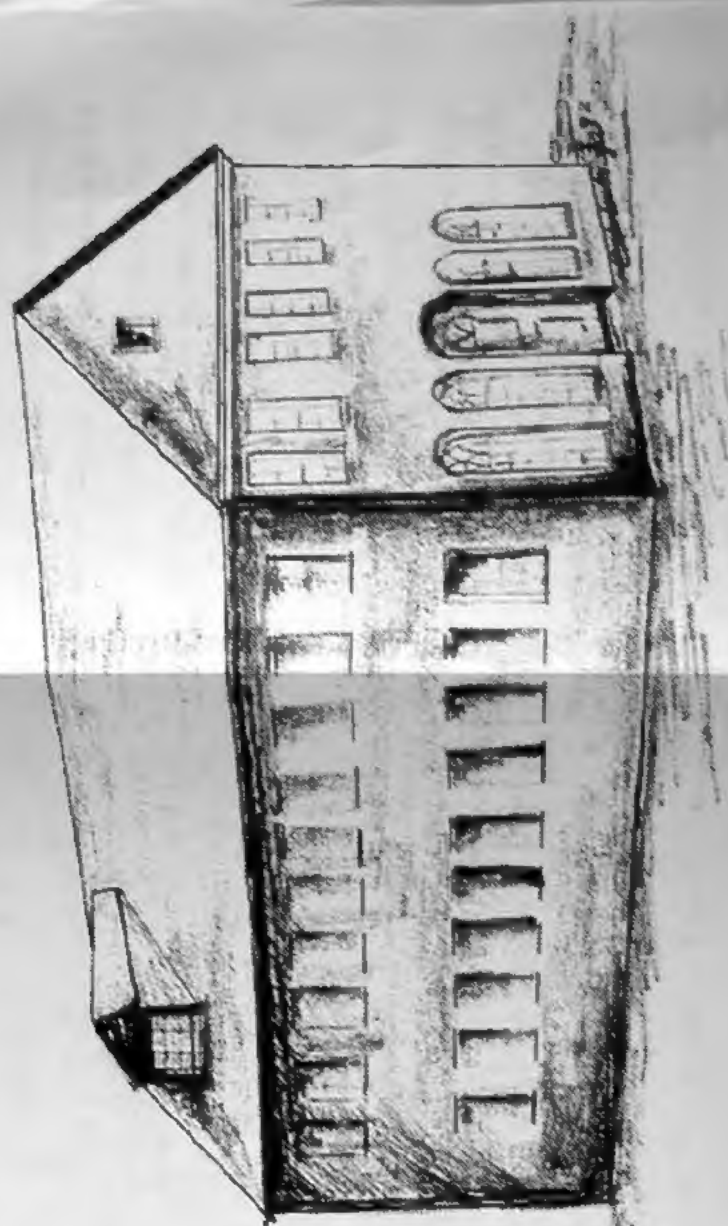
believed to be one of the oldest in the nation.

Ornate pressed metal panels adorn the ceiling and a beautiful, solid walnut balustrade along the balcony wraps around three sides of the 50 by 116-foot utilitarian performance hall. Thirty-two windows flood the auditorium with natural light.

In 1991 the Pocahontas County Historic Landmarks Commission acquired The Opera

House, intending to renovate it for use as a cultural and recreational center. Opera House Friends envision its use for activities ranging from drama, dance, arts and crafts and music to aerobics classes and much more.

The Opera House is located on Third Avenue in Marlinton. Heading east on State Route 39, turn right at the second traffic light. It is on the right near the end of the block.



# The Opera House

## The Opera House

Pocahontas County  
Historic Landmarks Commission  
P.O. Box 125  
Marlinton, WV 24954

The Opera House Friends  
Yes, I want to be part of the effort to save and restore this  
important Pocahontas County landmark. Enclosed is my check  
for \$5 \$10 \$25 \$50 \$100 other \_\_\_\_\_

Name \_\_\_\_\_  
Address \_\_\_\_\_  
In honor of \_\_\_\_\_  
Donor's name \_\_\_\_\_  
Address \_\_\_\_\_  
In memory of \_\_\_\_\_  
Donor's name \_\_\_\_\_  
Address \_\_\_\_\_

Mail tax-deductible contributions to:  
Pocahontas County  
Historic Landmarks Commission  
P.O. Box 125  
Marlinton, WV 24954



POCAHONTAS COUNTY OPERA HOUSE FOUNDATION  
PO BOX 282  
WARTON, WV 24862

OPERA HOUSE NOTES

# Calendar of Events

## FALL 2003

### September

- 20 **Black Mountain Bluegrass Boys**  
7:30 p.m.

Great "high lonesome" music from one of West Virginia's oldest and best traditional bluegrass bands.



### October

- 11 **A Night of Comedy with Margaret Baker and Glenn Singer**  
7:30 p.m.

A night of inventive comedy by two seriously demented actors who write and perform their own work



- 17-18 **The Complete Works of Shakespeare, Abridged**  
8 p.m.

This Pocahontas County Drama Workshop production zips through Shakespeare's entire repertoire with irreverent glee.



- 26 **Always . . . Patsy Cline**

3 p.m.



Greenbrier Valley Theatre's unforgettable production of the musical based on an incident in the life of the great country singer. This show features Patsy's greatest songs and a heart-warming story of the friendship that developed between the country music queen and a fan.

### November

- 8 **Soup Kitchen**  
7:30 p.m.



Back by popular demand, this popular a capella gospel trio sings music to sooth your soul

- 14 **West Virginia University Percussion Ensemble**  
7:30 p.m.

One of the most respected percussion groups in the nation will perform both school and evening performances.

## "Always . . . Patsy Cline" Brings a Legend to Life



**"Always . . . Patsy Cline is a delight from the first note to the last."**

—*Entertainment News*

On Sunday, October 26, Greenbrier Valley Theatre brings its hit production of *Always...Patsy Cline* to the Opera House for a performance at 3 p.m. This charming musical by Ted Swindley combines humor, sadness and reality. It offers those who remember and admire Cline a chance to look back to see what Cline was like and what she meant to her fans. It also gives them a chance to hear most of Patsy's great hits sung by a performer who rivals the original in talent and charisma.

Based on the true story of Cline's friendship with Houston housewife Louise Seger, *Always...Patsy Cline* focuses on the night Seger hears of Patsy's death in a plane crash.



Morgan Sturges as Patsy Cline

Her narrative recalls the wonderful rapport of the two friends, while Cline floats in and

out singing tunes that made her famous. "If you're a country-Western fan — or even if you're not, you'd be crazy to miss this show." (Connecticut Post)

Starring as Ms. Cline, is Morgan Sturges, who has spent the better part of three years singing Patsy's songs. Last year's premiere of this production at GVT in Lewisburg was her first time in *Always...Patsy Cline*. She also played Patsy in two productions of *A Chair Walk with Patsy Cline*.

Starring as Louise is GVT's own Artistic Director, Cathey Sawyer. The unforgettable music of Patsy Cline is performed by The Bodacious Bobcats, a back-up band with the authentic look and sound to perform some of country music's greatest tunes.

## MEET TWO ZANY PERFORMERS WHO HAVE BEEN "BITTEN BY THE FUNNY FAIRY"

Pocahontas County residents know Margaret Baker through her drama workshops with children in the county schools and the many productions she has directed for Pocahontas Drama Workshop. At last they will get a chance to see the many faces of Margaret's performing talents when she teams up with Lewisburg-based comic performer Glenn Singer for an evening of wacky fun at the Opera House on Saturday, Oct. 11, at 7:30 p.m.

Before moving to Pocahontas County in 1991, Margaret Baker spent seven years in Philadelphia garnering rave reviews for her hilarious one-woman shows, which she wrote as well as performed. She will revisit some of her favorite characters for this performance.



**"Baker variously recalls Lily Tomlin, Laurie Anderson, Catherine O'Hara, Woody Allen, and a chameleoid shapeshifter from outer space."**

*Philadelphia City Paper*



**"I've always liked the circus. I loved the clowns, although I couldn't help feeling sorry for the animals. So now I put on a real live wild animal act, only funnier."**

*Glenn Singer, aka El Gleno Grande*

*The Philadelphia Inquirer* called Margaret "a very talented, very versatile actress . . . a writer of wit and intelligence."

She has also been described as ridiculous, imaginative, buoyant, deeply weird, bitten by the funny fairy, wild, zany, wacky and wonderful!

Glenn Singer is also well known to regional audiences for his side-splitting act featuring his hyper-inflated alter ego, "El Gleno Grande." He has performed for over 15 years on every continent except Antarctica ("it's just a matter of time").

Glenn's act is a bit hard to describe, but one word describes it best: funny! As one critic put it, "He brings such fun and originality to his show the crowd can do nothing but scream in helpless laughter."



## Back by Popular Demand: The "High Lonesome" Sound of the Black Mountain Bluegrass Boys

The Opera House welcomes back our homegrown heroes, the fabulous **Black Mountain Bluegrass Boys**, for a concert on Saturday, Sept. 20.

One of West Virginia's oldest traditional bluegrass bands, The Black Mountain Bluegrass Boys started in Pocahontas County in 1968. Current band members are Richard Hefner, Rick Carpenter, Chris Nickell and Mike Smith. They are well known for their "high lonesome" sound of original bluegrass in the tradition of Ralph Stanley, Bill Monroe and Jimmy Martin.

Richard Hefner, banjo, vocals and comic relief, has won honors for his banjo expertise in Maryland, Virginia and West Virginia. His old-time harmonies are unrivaled.



Rick Carpenter has played with the band since he was about eight years old, joining the band on a regular basis in 1998, playing mandolin and adding lead and baritone vocals. He is also accomplished on electric bass, rhythm guitar and banjo.

Chris Nickell of Montoe

County adds outstanding rhythm and lead guitar.

Mike Smith of Cabell County has been in the bluegrass mainstream for the past 20 years, playing with a variety of bands. He drives the band with his unrelenting bass rhythm and adds the power behind this band.

Welcome home, "Boys!"

## Soup's On!

### A Capella Trio Ladles Out Ample Portions of Fun and Harmony

The members of **Soup Kitchen** are often amused when listeners describe them as "those people who sing with no music." They sometimes take the opportunity to gently point out that they make music with built-in string instruments, their vocal cords.

They are a human string trio that might be compared to bass fiddle, cello and viola, except that the **Soup Kitchen** instruments tell stories, and the rhythm and percussion are made of words. They will put their finely tuned instruments to work at a return engagement at the Opera House on Nov. 8.

**Soup Kitchen**, known individually as Will Fanning, Bill Kimmons and Rebecca Kimmons, has been around in one form or another since 1982, when as **The Soup Kitchen**

Gospel Quartet, they wheedled a performance during a break at the first Friends of Old Time Music and Dance (FOOTMAD) Festival near Charleston, WV.

Their a capella arrangements of old-time gospel songs brought down the house, and they've been at it ever since. They sing a variety of gospel tunes, rhythm and blues favorites, and an original tune or two.

Will Fanning is a native of Dublin, Ireland, who landed in West Virginia in the early 1970s. His vocals range from baritone to tenor, and he writes some songs as well. He also plays bass and guitar.

Bill Kimmons, originally from Statesville, NC, is known to patrons of Vocal Week at the Augusta Heritage Workshops in

Elkins as the bass component of the Old Time Southern Gospel Harmonies class, which he teaches with Tracy Schwartz, Ginny Hawker and Kay Justice.

Rebecca Kimmons grew up in southern West Virginia listening to her grandmother sing in the a capella style familiar to fans of Maggie Hammons Parker and Hazel Dickens. She has shared elements of this ancient singing style in a number of workshops, and she was a singer and interpreter of Louise McNeill's poetry in the award-winning West Virginia Public Radio production of *Gandy Mountain*.

Don't pass up a second helping of this great group!



"We sang the gospel in Northern Ireland and in every corner of the Republic of Ireland. Even if people don't connect with the message, they can't seem to resist the harmonies and rhythm. They're hard for us to resist too. That's why we keep doing it."

—*Soup Kitchen's Becky Kimmons*

## Drama Workshop Production Cuts Shakespeare Down to Size

The Pocahontas County Drama Workshop will present *The Complete Works of Shakespeare (Abridged)* on Friday and Saturday, Oct. 17 and 18, at 8 p.m. at the Opera House. This irreverent romp through the Bard's entire repertoire was written by Adam Long, Daniel Singer and Jesse Winfield.

The production is directed by Scott Small, who has extensive background in theater and film and who recently appeared in Drama Workshop productions of *The Glass Menagerie* and *All This and Moonlight*. Actors for the production are the Prematural Players: Scott Small, Kris "Birdman" King and Alan Cornelius.

*The Complete Works of Shakespeare (Abridged)* is a mix of prat-falls, puns, willful misreadings of names and dialogue, clunky female impersonations, clean-cut ribaldry and broad burlesque. Ben Brantley of *The New York Times* said the play "embodies one of comedy's most essential impulses: the adolescent urge to take a baseball bat to the culturally revered . . . At its giddiest, its tone recalled the fabled Bullwinkle cartoon shows."



## WVU Percussion Ensemble Will Perform Nov. 14

The WVU Percussion Ensemble will give two performances at the Opera House on Friday, November 14. The group will give a school performance in the afternoon and a public performance in the evening.

Over the past 25 years, the Percussion Department at WVU has developed into one of the most respected in the nation. Because of its commitment to excellence, its reputation has also spread worldwide. Besides emphasis on the primary instruments, WVU percussion students also experience a wide spectrum of opportunities through the World Music Center. They put on a great show. Don't miss it!

The Pocahontas County Opera House Foundation thanks Pocahontas County Drama, Fairs and Festivals, The West Virginia Commission on the Arts and the National Endowment for the Arts for their generous support of our Performance Series.

Get involved with the Opera House! Volunteers are needed to serve on the board and to assist with performances. Contact Rene White at 799-4035 or Lauren Bennett, 799-4009 if you'd like to help out.



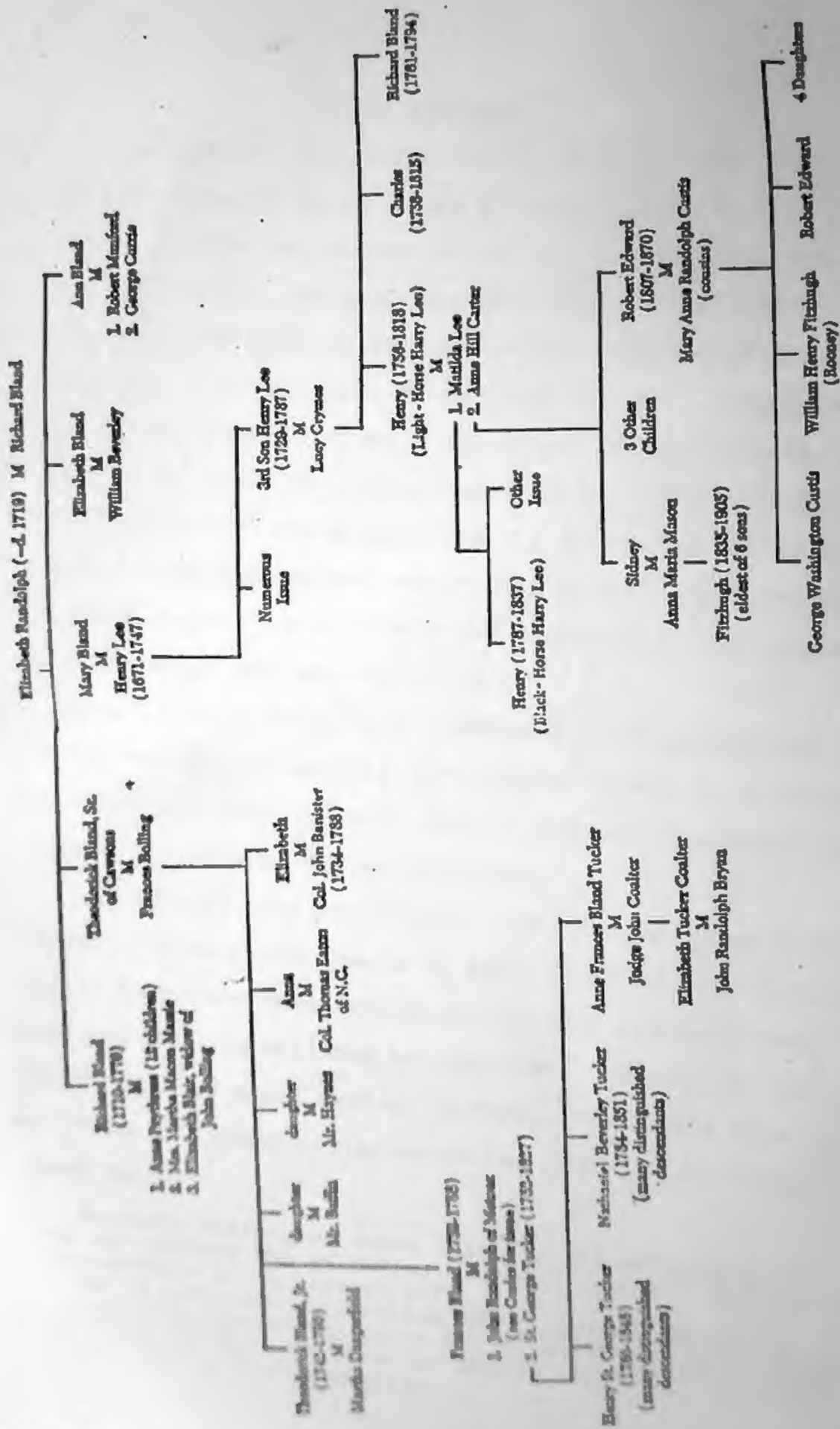
POCAHONTAS COUNTY OPERA HOUSE FOUNDATION  
PO BOX 282  
MARLINTON, WV 24864

Production of this newsletter is made possible in part by a grant from the Pocahontas County Convention & Visitors Bureau.



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MARLINTON WV

Mary Black  
M  
William Dorey  
M  
1. Robert Mendenhall  
2. George Corbin



## In MEMORIAM

No beautifully written tribute from the available sources of literature or poetry seems to express just what we want to say as we honor the memory of our two dear friends, Mrs. Price and Mrs. Smith. The most beautiful and fitting tribute comes from quiet thoughts of the many years we were privileged to have them with us. As a charter member, Mrs. Price helped to select the original motto of our club, "Better a little well-kept than a great deal forgotten." This little sentence speaks an important thought from the philosophy of these two women. They were modest, never seeking the limelight, persistent in their efforts from the beginning to the end of any task to which they set their hands.

Outstanding among their countless contributions was the common talent they shared, the ministry of music, as individuals and as leaders of many musical programs throughout more than forty years of active membership.

As we have been privileged to be numbered among their friends and have been guests in their homes we know that the finest traditions were well-kept with them and that their many achievements will not be forgotten. Now, as in their lifetimes, they would want no fanfare. They would want us to "sound no trumpets, ring no bells. The Book of Life their record tells."

.....  
Heavenly Father, we thank Thee for the friendship of these our members who walked with us and have now been called to Thy service in the larger life.  
May we have grace to follow the example shown forth in the interpretation of Thy glory in their lives, and strength to continue in the work which we shared with them, in truth, in beauty and in righteousness.



Kindle Thy flame in our hearts that others may be warmed thereby. Cause Thy light to shine in our souls that others may see the way. Keep our sympathy and insight ready, our wills keen and our hands quick to help all who are in need.

And may we know, that when our earthly days come to an end, our service to Thee and to each other shall cease only to begin again as we continue our pilgrimage with these-- "our good companions of the way," through Him, who by His death overcame death, and opened unto us the gates of everlasting life, Thy Son our Lord. Amen.

Kendall, George - Captain, Councilor - died December 1, 1607  
Kingston (or Kiniston), Ellis - Gentleman - died September 18, 1607

Laxton (or Laxon), William - Carpenter  
Laydon, John - Laborer, Carpenter  
Loue (or Love), William - Tailor, Soldier

Martin, John, (Senior), Captain, Councilor - died June 1632  
Martin, John, (Junior), Gentleman - died August 18, 1607

Martin, George - Gentleman  
Midwinter, Francis - Gentleman - died August 14, 1607

Morish (or Morris), Edward - Gentleman, Corporal - died August 14, 1607

Morton, Matthew - Sailor  
Mounslie, Thomas - Laborer - died August 17, 1607

Mouton, Thomas - Gentleman - died September 19, 1607  
Mutton, Richard - Boy

Peacock (or Peacocke, Pecock), Nathaniel - Boy  
Penington, Robert - Gentleman - died August 18, 1607

Percy (or Percie, Percye), George - Master, Gentleman - died 1632  
Pickhouse (or Piggas), Drue - Gentleman - died August 19, 1607

Posing (or Pising), Edward - Carpenter  
Powell, Nathaniel - Gentleman - died March 22, 1622

Profit, Jonas - Fisherman  
Ratcliffe (or Sicklemore), John - Captain, Councilor - died November 1609

Read, James - Blacksmith, Soldier - died March 13, 1622  
Robinson, John (or Jehu) - Gentleman - died December 1607

Rods (or Rodes, Roods), William - Laborer - died August 27, 1607  
Sands, Thomas - Gentleman

Short, John - Gentleman  
Short, Edward - Laborer - died August 1607

Simons, Richard - Gentleman - died September 18, 1607  
Skot (or Scot), Nicholas - Drummer

Small, Robert - Carpenter  
Smethes, William - Gentleman

Smith (or Smyth), John - Captain, Councilor - died June 1631  
Snarsbrough, Francis - Gentleman

Stevenson, John - Gentleman  
Studley (or Stoodie), Thomas - Gentleman - died August 28, 1607

Tankard, William - Gentleman  
Tavin (or Tauin), Henry - Laborer

Throgmorton (or Throgmortine), Kellam (or Kenelme) - Gentleman - died August 26, 1607

Toskill, Anas - Soldier  
Unger (or Unger), William - Laborer

Waller (or Waler), John - Gentleman - died August 24, 1607  
Walker, George - Gentleman

Webbe, Thomas - Gentleman  
White, William - Laborer

Wilkinson, William - Surgeon

The First Residents of Jamestown  
Those who remained when the ships returned to England after  
the settlement had been established.

Adling (or Adding), Henry - Gentleman  
Alicock (or Alikock), Jeremy (or Jerome) - Gentleman - died  
August 14, 1607  
Archer, Gabriel - Captain, Gentleman - died Winter 1609-1610  
Asbie, John - died August 6, 1607  
Beast (or Best), Benjamin - Gentleman - died September 5, 1607  
Behothland (or Behethand, Beheland), Robert - Gentleman - died  
1628  
Brinto (or Brinton), Edward - Mason, Soldier  
Brookes, Edward - Gentleman - died April 7, 1607  
Brookes, John - Gentleman  
Browne, Edward - Gentleman - died August 15, 1607  
Brunfield, James - Boy  
Bruster (or Brewster), William - Gentleman - died August 10, 1607  
Capper, John  
Cassen (or Cawsen), George - Laborer - died December 1607  
Cassen, Thomas - Laborer  
Cassen, William - Laborer  
Clovill, Ustis (or Eustace) - Gentleman - died June 7, 1607  
Collier, Samuel - Boy - died 1622  
Cooke, Roger - Gentleman  
Cooper (or Cowper), Thomas - Barber  
Crofts, Richard - Gentleman  
Dixon, Richard - Gentleman  
Dods, John - Laborer, Soldier  
Emry, Thomas - Carpenter - died December 1607  
Fenton, Robert - Gentleman  
Flower (or Flowre), George - Gentleman - died August 9, 1607  
Ford, Robert - Gentleman  
Frith, Richard - Gentleman  
Galthrope (or Halthrop, Calthrop), Stephen - Gentleman - died  
August 15, 1607  
Garret, William - Bricklayer  
Golding (or Goulding), George - Laborer  
Gosnold (or Gosnoll), Anthony, (Cousin) - Gentleman - died  
January 7, 1609  
Gosnold (or Gosnoll), Anthony, (Cousin) - Gentleman  
Gosnold (or Gosnoll), Bartholomew - Captain, Councilor - died  
August 16, 1607  
Gower (or Gore), Thomas - Gentleman - died August 16, 1607  
Harrington, Edward - Gentleman - died August 24, 1607  
Hard, John - Bricklayer  
Houlgrave, Nicholas - Gentleman  
Hunt, Robert - Master, Preacher, Gentleman - died before 1609  
Jacob, Thomas - Sergeant - died September 4, 1607  
Johnson, William - Laborer

Kendall, George - Captain, Councilor - died December 1, 1607  
Kingston (or Kiniston), Ellis - Gentleman - died September 18,  
1607

Laxton (or Laxon), William - Carpenter  
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Love (or Love), William - Tailor, Soldier  
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Pewell, Nathaniel - Gentleman - died March 22, 1622  
Profit, Jonas - Fisherman  
Ratchiffe (or Sicklemore), John - Captain, Councilor - died

November 1609

Read, James - Blacksmith, Soldier - died March 13, 1622  
Robinson, John (or Jehu) - Gentleman - died December 1607  
Rods (or Rodes, Roods), William - Laborer - died August 27, 1607  
Sands, Thomas - Gentleman  
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Johnson, William - Laborer

24 August, 2001  
 Route 1  
 Marlinton, West Virginia  
 24954

Darrell McGraw  
 Office of the Attorney General  
 Capitol Building, Room 26, East Wing  
 Charleston, West Virginia 25305

Dear Sir,  
 I have heard that you are aware of, and concerned about official misconduct and corruption, and disrespect for law and for the citizenry in Pocahontas County. Please read this recent history.

On 27 June, 2001, at the regular monthly public meeting of the Pocahontas County Solid Waste Authority, member Jim Burks (Soil Conservation Service appointee and co-owner of County Disposal Service, the county's only private waste hauler) asked Authority Chairman Ed Riley (Public Service Commission appointee, also County Sanitarian) why was the Authority retaining attorney David Sims of Elkins as their counsel in a lawsuit in which the Authority is defendant, instead of getting a "good lawyer at no cost through the State Board of Risk?"

Chairman Riley replied, "If you want me to answer that question, we will have to go into executive session."

I have attended Solid Waste Authority meetings more regularly than most of the members, as a concerned member of the public, for many years. I was present that night, and I spoke up and said, "Although discussion of pending litigation was a permitted justification for an executive session under an earlier version of the Sunshine Law, I believe it is no longer."

I did not record who moved and who seconded the motion to go into executive session, but no member there demurred, no discussion preceded the vote, and no specific reason for the session was stated.

After the public was readmitted to the meeting, no further mention was made of the subject, and no action apparently relevant to the issue was taken.

On the 29th of June, I filed a request under the Freedom of Information Act (a copy of which is enclosed). A copy of the reply I received is also enclosed. Mr Riley's action in capriciously and irrelevantly denying my request was apparently his own, since no announced public meeting of the Authority took place between my request and his denial.

At least six distinct and wilful violations of law appear to me to have been committed here by Mr. Riley and/or the Members of the Authority. I would call them egregious, but they represent typical conduct of this group.

1. No specific statutorily acceptable justification for the executive session was publicly stated.

2. The executive session was itself illegal, since statutorily acceptable justification did not exist.

3. My statement had warned the Authority members that the legality of their contemplated action was, in my opinion, against the law. The members corporately and severally disregarded this warning, and made no effort to check the law. This constitutes a violation of their obligation to uphold the law in their official capacity.

2 Open Governmental Proceedings Act appears to have been violated by  
 3 conspiracy of the members.

5 The denial of my FOIA request by Mr. Riley appears to be without justification

6 Mr. Riley's personal decision to deny this request seems to represent action  
 beyond his authority.

I took this sorry tale on 10 July to Pocahontas County Sherriff Bob Alkire. He was sympathetic, said that he was aware of other people's dissatisfactions with Mr. Riley, but that he did not know exactly what to do about it. He said that he would consult with Prosecuting Attorney Walt Weiford, and would telephone me.

He did so promptly, and said that Mr. Weiford said that my appropriate remedy was to file civil suit asking for the proceedings of the executive session.

I explained that, although I would like to know what was said, my greater concern was to see the members of the Authority held accountable for their habitual disregard of the law and of the public. Mr. Alkire said that he would speak to Mr. Weiford again.

The next day, I think it was, Sherriff Alkire called back, and put me on a speaker-phone with Walt Weiford. I told him the story.

After some rambling about executive sessions being upheld in court (I assumed he meant, executive sessions that appeared to violate OGPA), he ended up saying that he did not feel justified in arresting anyone over it.

On 24 July, I finally had time to speak to the State Police. I spoke to a Mr. Moore and a Mr. Barlow, at the Marlinton Detachment. They listened politely to the whole story. I showed them a summary of the portion of the Open Governmental Proceedings Act which dealt with executive sessions, with which they were not familiar.

By this time, I had read more of the OGP law, specifically Section 6-9A-8. Action by reference is Standard Operating Procedure at the Pocahontas County Solid Waste Authority. Every meeting opened with Chairman Riley's mumbled statement, "A copy of the minutes [of the last meeting] has been sent to each of you [members], are there any additions or corrections?" Silence follows, then motion, second, and the vote to approve.

The Authority's bills and financial statement lie in the table at which the Authority members sit, and a sometimes lengthy period of silent contemplation of these by the members, occasionally punctuated by a question from Member Jim Marks, is the next regular agenda item, followed by motion and vote to pay the bills.

Although I have several times commented to the Authority that this procedure is discourteous in the ext remo, and gives the strong impression that the involvement of the public is not welcome, I did not know that it was actually against the law.

After I explained all this to the State Police, their response was to say that any action that they might take would be through Walt Weiford. Sergeant Barlow telephoned me that same evening to say that he had set up an appointment for me with Mr. Weiford and himself for 31 July.

I believe that it was on the 30th that I received a call from Mr. Weiford's office cancelling the appointment due to a scheduling conflict.. Mr. Weiford has



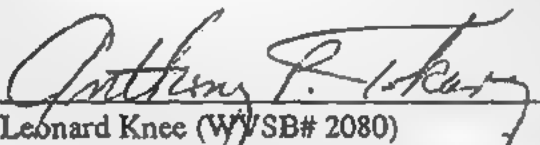
40 CFR § 127(d). Accordingly, Waco must be allowed to intervene regarding Snowshoe's violations either as a matter of right or as a matter of permission in order for DEP's enforcement action to comply with the requirements of the Federal Water Pollution Control Act.

WHEREFORE, Waco respectfully moves the Court to enter the attached proposed Order granting Waco leave to intervene in the above-styled action and to file the attached pleading.

Respectfully submitted,

WACO OIL AND GAS COMPANY, INC.,

By counsel,

  
Leonard Knee (WVSB# 2080)  
Anthony P. Tokarz (WVSB # 5142)  
Bowles Rice McDavid Graff & Loye PLLC  
Post Office Box 1386  
Charleston, WV 25325-1386  
(304) 347-1100

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

ALLYN G. TURNER, DIRECTOR  
DIVISION OF WATER AND WASTE  
MANAGEMENT, WEST VIRGINIA  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

Plaintiff,

v.

Civil Action No.: 03-C-29

SNOWSHOE MOUNTAIN, INC.  
and SNOWSHOE WATER and  
SEWER, INC.

Defendants,

and

WACO OIL AND GAS COMPANY, INC.,

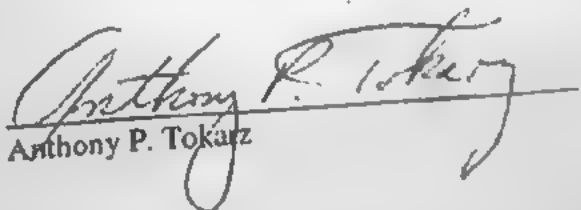
Intervener Plaintiff.

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that the foregoing "Motion to Intervene of Waco Oil and Gas Company, Inc." was served on this 11<sup>th</sup> day, of July, 2003, via regular U.S. Mail upon the appropriate parties and addressed as follows:

Joseph A. Lazell, Esquire  
Office of Legal Services  
West Virginia Department of Environmental Protection  
1356 Hansford Street  
Charleston, West Virginia 25301

Robert G. McLusky, Esquire  
Jackson Kelly PLLC  
P. O. Box 553  
Charleston, West Virginia 25322-0553

  
Anthony P. Tokarz

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

AL LYN G. TURNER, DIRECTOR  
DIVISION OF WATER AND WASTE  
MANAGEMENT, WEST VIRGINIA  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

Plaintiff,

v.

Civil Action No.: 03-C-29

SNOWSHOE MOUNTAIN, INC.  
and SNOWSHOE WATER and  
SEWER, INC.

Defendants,

and

WACO OIL AND GAS COMPANY, INC.,

Intervener Plaintiff.

COMPLAINT OF INTERVENER WACO OIL AND GAS COMPANY, INC.

INTRODUCTION

1. This is an Intervener Action in a suit brought by the Plaintiff, Allyn G Turner, Director, Division of Water and Waste Management, West Virginia Department of Environmental Protection ("WVDEP") against the Defendants, Snowshoe Mountain, Inc. ("Snowshoe Mountain") and Snowshoe Water and Sewer, Inc. ("Snowshoe Water and Sewer") for violations of the West Virginia Water Pollution Control Act ("WPCA"), West Virginia Code §§22-11-1 through -28. For its common law claims which arise out of the Defendants' violations of the WPCA, the Intervener, Waco Oil and Gas Company, Inc., ("Waco") seeks declaratory judgment, injunctive relief, compensatory damages, punitive damages and award of its costs, including attorney's fees and expert witness' fees.

## INTERVENING PARTY

2. The Intervener, Waco is a corporation organized under the laws of the State of West Virginia. Waco owns three tracts of real property totaling about 380 acres in Pocahontas County, West Virginia adjacent to Big Spring Fork of the Elk River. This property is downstream from Snowshoe's discharge points. Representatives of Waco utilize Big Spring Fork for recreational purposes. Further, the value of Waco's property for recreational development is directly related to the pristine quality of Big Spring Fork.

## JURISDICTION AND VENUE

3. Pursuant to West Virginia Code §51-2-2, the Court has jurisdiction over the subject matter of this Intervener Action and venue is proper in this Court pursuant to West Virginia Code §56-1-1 because the Plaintiff and the Defendants reside in this Circuit and Waco's causes of action arose in this Circuit.

## GENERAL ALLEGATIONS

4. West Virginia/National Pollution Discharge Elimination System ("WV/NPDES") Permit No. WV0023311 and WV/NPDES Permit No. WV0103110 were issued by WVDEP to Snowshoe Mountain and/or Snowshoe Water and Sewer (hereinafter collectively "Snowshoe")<sup>1</sup>. Under these WV/NPDES Permits, Snowshoe discharges pollutants from the Snowshoe Mountain Resort Complex in Pocahontas County into an unnamed tributary of the Cupp Run of Big Spring Fork and directly into Big Spring Fork.

5. The receiving streams to which Snowshoe discharges pollutants are pristine mountain head water streams with special aesthetic and ecological value. Cupp Run is a native reproducing trout stream. Big Spring Fork is also a trout stream. Both Cupp Run and Big Spring Fork have been proposed for classification as Tier 2.5 waters, which are State Waters of Special Concern in which no degradation should be allowed without conducting a socioeconomic review.

---

<sup>1</sup> DEP, Snowshoe Mountain and Snowshoe Water and Sewer have so intermingled the names of Snowshoe Mountain and Snowshoe Water and Sewer in the documentation pertaining to these WV/NPDES Permits that the identities of the actual permit holders are unclear. Thus, for purpose of these WV/NPDES Permits, Snowshoe Mountain and Snowshoe Water and Sewer have essentially become a single entity which will be referred to as "Snowshoe".



6. Since June 2000, Snowshoe's violations of the WV/NPDES Permits limitations and conditions have been numerous and ongoing. On August 14, 2002 Snowshoe entered into Consent Orders with DEP regarding its noncompliance with the two WV/NPDES Permits (the "Consent Orders"). The Consent Orders basically require Snowshoe to take all measures to comply with its WV/NPDES Permits and to ensure proper operation and maintenance of its waste water treatment systems. Snowshoe was also required under the Consent Orders to submit to DEP within 10 days of the entry of the Orders proposed corrective action plans for achieving compliance.

7. On February 15-16, 2003, DEP conducted a compliance inspection of Snowshoe's two waste water treatment plants ("WWTPs") operating under the WV/NPDES Permits. Numerous permit violations were noted.

8. Snowshoe's additional violations of its WV/NPDES Permits occurred only six months after Snowshoe entered into the Consent Orders. The effect of Snowshoe's noncompliance is devastating to the receptive pristine mountain headwater trout streams. For example, Snowshoe discharged water from a spill from its chlorine contact chamber with a TRC concentration of 0.73 mg/l for at least 55 days into a tributary of Cupp Run. In addition, Snowshoe has deposited sludge into the stream bed of Big Spring Fork for 375 feet down stream from its outfall, resulting in a proliferation of a species indicative of polluted waters.

9. To date, Snowshoe has not conducted proper operation and maintenance of its WWTPs. For example, Snowshoe failed to remove sludge from its WWTPs. It failed to calibrate its flow meters. It failed to report or correct substantial spills which occurred at the WWTPs. These omissions placed the Big Spring Fork watershed in continuing jeopardy and created a condition of ongoing WV/NPDES permit violations by Snowshoe.

10. Upon information and belief, Snowshoe has known for a considerable length of time that its WWTPs were not complying and would not comply with the terms and conditions of the NPDES permits held by Snowshoe for these facilities. Upon information and belief, Snowshoe knew that its operations would cause pollution.

### **FIRST CAUSE OF ACTION NUISANCE**

11. Waco repeats the allegations of Paragraphs 1-10 above, as if fully set forth herein.

12. Snowshoe's discharge of sewage and other pollutants into Cupp Run and Big Spring Fork are both a public and a private nuisance to Waco.

13. Snowshoe is liable to Waco for damage caused by Snowshoe's nuisances to Waco's recreational, esthetic, economic and property interests.

### **SECOND CAUSE OF ACTION INTENTIONAL TORT**

14. Waco repeats the allegations of Paragraphs 1-13 above, as if fully set forth herein.

15. Upon information and belief, Snowshoe has known that, without taking steps to prevent pollution, its operations would cause pollution, and yet Snowshoe failed to take such steps to prevent pollution from occurring. Snowshoe's actions are willful, wanton, and reckless.

16. Snowshoe is liable to Waco for the damage caused by its intentional tort to Waco's recreational, esthetic, economic and property interests.

### **THIRD CAUSE OF ACTION NEGLIGENCE**

17. Waco repeats the allegations of Paragraphs 1-16 above, as if fully set forth herein.

18. Snowshoe's failures to take reasonable care to prevent the discharge of pollutants into the receiving streams of Cupp Run and Big Spring Fork constitutes negligence.

19. Snowshoe is liable to Waco for damages caused by its negligence to Waco's recreational, esthetic, economic and property interests.

**FOURTH CAUSE OF ACTION  
WPCA VIOLATIONS**

20. Waco repeats the allegations of Paragraphs 1-19 above, as if fully set forth herein.
21. Waco incorporates by reference DEP's complaint in this matter, as if fully set forth herein.
22. Snowshoe is liable to Waco for an appropriate amount of damages for its violations of the WPCA.

**REQUESTS FOR RELIEF**

WHEREFORE, Waco respectfully requests that the Court grant the following relief:

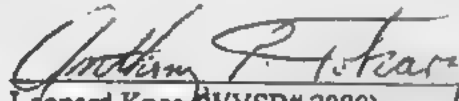
1. Declare that Snowshoe had discharged and continues to discharge pollutants in excess of its WV/NPDES Permit conditions and limitations.
2. Order Snowshoe to cease operating its WWTPs in such a manner that will result in further discharges of pollutants in excess of its WV/NPDES Permit conditions and limitations.
3. Order such injunctive relief as the Court deems appropriate against Snowshoe to abate Snowshoe's nuisance and trespass actions.
4. Award to Waco from Snowshoe, compensatory damages for losses Waco's incurred to his recreational, esthetic, economic and property interests.
5. Award to Waco from Snowshoe, as appropriate amount of punitive damages for Snowshoe's willful, wanton and reckless misconduct in discharging unlawful pollutants into pristine trout streams and the drinking water springs located on Waco's property.
6. Award Waco its attorneys' fees, costs, and expenses in this action.

7. Award such further relief as this Court deems appropriate

**JURY DEMAND**

Waco requests trial by jury for its causes of action and claims for relief so triable

Respectfully submitted,



Leonard Kneec (WVSB# 2080)  
Anthony P. Jokarz (WVSB# 5142)  
Bowles Rice McDavid Graff & Loye PLLC  
Post Office Box 1386  
Charleston, WV 25325-1386  
(304) 347-1100

*Counsel for Plaintiff Intervener, Waco Oil and Gas  
Company, Inc.*



IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

ALLYN G. TURNER, DIRECTOR  
DIVISION OF WATER AND WASTE  
MANAGEMENT, WEST VIRGINIA  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

Plaintiff,

v.

Civil Action No.: 03-C-29

SNOWSHOE MOUNTAIN, INC.  
and SNOWSHOE WATER and  
SEWER, INC.

Defendants,

and

WACO OIL AND GAS COMPANY, INC.,

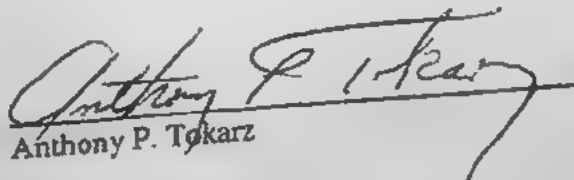
Intervener Plaintiff.

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that the foregoing "Complaint of Intervener Waco Oil and Gas Company, Inc." was served on this 11<sup>th</sup> day of July, 2003, via regular U.S. Mail upon the appropriate parties and addressed as follows:

Joseph A. Lazell, Esquire  
Office of Legal Services  
West Virginia Department of Environmental Protection  
1356 Hansford Street  
Charleston, West Virginia 25301

Robert G. McLusky, Esquire  
Jackson Kelly PLLC  
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Anthony P. Tokarz

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

ALLYN G. TURNER, DIRECTOR  
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DEPARTMENT OF ENVIRONMENTAL  
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Plaintiff,

v.

Civil Action No.: 03-C-29

SNOWSHOE MOUNTAIN, INC.  
and SNOWSHOE WATER and  
SEWER, INC.

Defendants.

ORDER

On \_\_\_\_\_ day of \_\_\_\_\_, 2003 the Court addressed the Motion to Intervene of Waco Oil and Gas Company, Inc. and heard argument of counsel. Upon good cause shown and for those reasons set forth more fully upon the record, it is ORDERED and ADJUDGED that Waco Oil and Gas Company, Inc. shall be granted leave to intervene and file pleadings on its own behalf.

The Clerk is directed to enter this ORDER in and for the date set forth below and send an attested copy of this ORDER to counsel of record.

ENTERED on this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

\_\_\_\_\_  
James J. Rowe, Circuit Judge

B.H.

3-15-4

: ONE MORE PIECE of INFORMATION  
 THE SCOTT FIRM INTERVIEW WITH  
 ADAM (3-11-4) I GAVE FIRM THE INFO +  
 LEADS. AND THE NORMAN ALDERMAN  
 "VIEWPOINT" of 3-12-4. BOTH A  
 RESULT of THE PUBLISHER  
 CRAIG SELBY LISTENING TO ME  
 AND DECIDING THE STORIES WERE  
 TRUE AND SHOULD BE REPORTED  
 HOW REFRESHING. V.T. Russell Holt

stated that economic benefit analysis provides an approximation of the "amount of money a company has gained over its competitors by failing to comply with the law."

The Defendants contended in their December 1, 2003 letter that the "cost-avoided" method whereby economic benefit is measured by determining the avoided and/or delay cost of compliance is the only method. However, the Fourth Circuit in United States v. Smithfield Foods, 191 F.3d 516 (4<sup>th</sup> Cir. 1999) specifically recognized the Third Circuit's use of the "wrongful profits" measure of economic benefit United States v. Dean Dairy Products Company, Inc., 150 F.3d 259 (3<sup>rd</sup> Cir. 1998). In Dean Dairy, the Court stated that "it is significant that neither the statute nor the case law supports the contention that the cost-avoidance method is the only permissible method of determining the amount a polluter had gained from violating the law. Dean Dairy, 150 F.3d at 266. Under the wrongful profits method, the violator's economic benefit is calculated by determining what the violator would have lost per year in revenues from a customer it would have had to drop in order to reduce production enough to comply with its permit. Dean Dairy, 150 F.3d at 262-67.

The Third Circuit in explaining its choice of the "wrongful profits" method explained that requiring a company to reduce the amount of pollution it creates to comply with its permit is not unreasonable. Id. Indeed, one commentator described the significance of the Dean Dairy decision as follows:

The significance of the Dean Dairy decision is mighty. Prior to the decision, companies like Dean Dairy were willing to risk a penalty action rather than install pollution control equipment because, even if they were caught, they calculated that the penalty would be insignificant, based on the delayed capital expenditure analysis, when compared to the net increase in earnings that they would gain by maintaining high production. In other words, there was no incentive for Dean Dairy to install the pre-treatment plant unless it was sued. Now companies like Dean Dairy will realize that if they choose not to install pollution control equipment, they could be risking a multiple of the margin of profits that they earn by maintaining high levels of production at cost to the environment. Faced with this potential penalty, no profit-maximizing company would choose to take the risk.

Lynn N. Dodge, *Economic Benefit in Environmental Civil Penalties*, 14 *Env't & Nat'l Resources* 77 U. Del. Mercy L. Rev. 543, 552 Spring, 2000.

Accordingly, Waco submits that the Defendants' financial information requested in the above-described discovery requests is relevant and the Court should have that information available to it should the Court elect to use the "wrongful profits" method of determining the economic benefit the Defendants gained by their violations of the WYWPCA.

Even if the Court decides to utilize the "cost avoidance" method advocated by the Defendants, the financial information of the Defendants is still relevant. The purpose of the CWA's penalty provision is "deterrence with respect to both the violator's future conduct (specific deterrence) and the general population regulated by the Act (general deterrence)." Catskill Mountain Chapter of Trout Unlimited, Inc. v. City of New York, 244 F.Supp. 2d 41, 48 (N.D. N.Y. 2003).

To attain the goal of deterrence, the penalty must have two components: (1) "it must encompass the economic benefit of noncompliance to ensure that the violator does not profit from its violation of the law" and (2) it "must include a punitive component in the form of a sum in addition to economic benefit which accounts for the degree of seriousness and/or willfulness of the violation. Id.

In other words, "the central purpose of CWA penalties is to deter the defendant, and others from committing future violations." Piney Run Pres. Ass'n v. County Comm'rs of Carroll County, 82 F. Supp. 2d 464, 472 (D. Md. 2000), vacated and remanded on other grounds, 268 F.3d 255 (4<sup>th</sup> Cir. 2001). "A damage award that is limited to economic benefit, therefore, is no deterrent at all because the violator would be no worse off than if it had complied in the first place. Id.

In assessing the amount of the punitive component, i.e., the sum in addition to the economic benefit which accounts for the degree of seriousness and/or willfulness of the violations, courts determine the economic impact of that penalty upon the violator. In evaluating the economic impact, courts consider a broad spectrum of financial information. For example, in

United States v. Allegheny Ludlum Corporation, 187 F Supp 2d 426 (W D Pa 2001) the Court stated:

The Court concludes that in light of the financial position of ALC, a penalty of \$8,244,670.00 - - a doubling of the economic benefit in this case - - will not have an adverse impact on the company. We know, in particular, the strength of ALC's financial position as reflected in ALC's filings with the Securities & Exchange Commission. ALC's 1999 10-K, the most recent presented at trial, states that the profits of ALC in 1998 and 1999 were \$52 million and \$37.2 million respectively. Trial transcript 2/8/2001, Doc. No. 322, at 25; Plaintiff's Exhibit P-592. ALC's 10-Q which was filed in November 3, 2000 also contains positive projections for ALC's future growth. Plaintiff's Exhibit P-1063. Indeed, we think it is important to note that ALC's 10-K specifically references this lawsuit and states that "management does not believe the disposition [of this matter] is likely to have a material adverse effect on the company's financial condition or equity, although the resolution of any reporting period of one or more of these matters could have a material adverse effect on the company's results of operation for that period". Plaintiff's Exhibit P-592 at 20.

Allegheny Ludlum, 187 F.Supp. 2d at 441.

Therefore, whether the Court elects to utilize the "wrongful profits" method or the "cost-avoidance" method for determining economic benefit, information pertaining to the Defendants' financial condition is relevant for the determination of the punitive component of the penalty in terms of its economic impact upon the Defendants.

### CONCLUSION

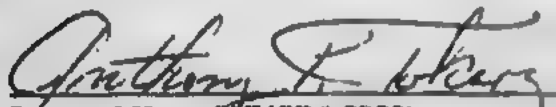
Wherefore, for the reasons set forth above, Waco respectfully requests that this Court enter an Order which compels the Defendants to adequately respond to Waco's Interrogatory No. 7 and Document Requests Nos. 2, 3 and 4. A proposed Order is attached hereto.



Respectfully submitted,

INTERVENER PLAINTIFF,  
WACO OIL AND GAS COMPANY, INC.,

By counsel,



Leonard Knee (WVSB# 2080)

Anthony P. Tojarz (WVSB # 5142)

Bowles Rice McDavid Graff & Love LLP

Post Office Box 1386

Charleston, WV 25325-1386

(304) 347-1100

1221557-1

State of West Virginia  
Division of Environmental Protection  
Environmental Enforcement

Time In 1/11/07 No  
Time out 1/13/07  
County Pocahontas

Facility Inspection Report

Facility Name Snowshoe Mountain Resort Location Snowshoe  
Permit No. LV0023311 Exp. Date 1/16/07 Design Flow 580,000 gal  
Permitter Snowshoe Mtn. Ad. Resort Present Flow 260 gpm  
Address P.O. Box 10, Snowshoe, WV 26209 Weather Sunny - 61°  
( ) Municipal Plant ( ) PSD ( ) Package Plant (X) Ponds ( ) Other

Evaluation codes: S-satisfactory M-marginal U-unsatisfactory N/A-not applicable N/O-not observed N/D-not determined

Prelim/Primary	Second/Tert	Other
01 Collection System	16 Pond-Stab.	31 Trickling Filter
02 Pump Stations	17 Pond-Polishing	32 Dosing Device
03 Influent	18 Pond-Lagoon	33 Sludge Dewatering
04 Flow Meter	19 Aeration	34 Digester
05 Trash Trap	20 Clarifier (s)	35 Sludge Disposal
06 Grease Trap	21 Scum Removal	36 Trash Disposal
07 Bar Screen	22 Chemical Feeders	37 Ash Disposal
08 Comminutor	23 Filtration	38 Oil Disposal
09 EQ Basin	24 Chlorination	39 General Housekeeping
10 Holding Tank (s)	25 Disinfection	40 Surface H2O Diversion
11 Clarifier (s)	26 Contact Chamber	41 Dike Condition
12 Separator (s)	27 Post Aeration	42 Fence
13 SSO/CSO/Bypasses	28 Dechlorination	43 Records
14 Grit Removal	29 UV	44 Discharge Limitations
15 F&I	30 SBR(s)	45 Auxiliary Power
		46 Laboratory
		47 MSDs
		48 Chemical Handling
		49 HAZMAT
		50 Stormwater
		51 Nonpoint
		52 Shipping/Recvg
		53 Monitoring Wells
		54 MW reports
		55 SPCC
		56 BMPs
		57 Process Controls
		58 MLSS
		59 Compliance Act
		60

Discharge #	Flow	pH	Cl2res	DO	Odor	Marker	Appearance	Sample	Photos	Evaluation
001	See Above		-			S	cloudy			M

Receiving Stream / Basin Cupper Run / Kanawha

Comments / Deficiencies:

09) extensions are in place; need to finish electrical; need to connect blowers  
29) Filters are not working 29) UV is not working  
\* Facility is not in compliance as required by Phase I upgrades  
\* Permittee is not reporting spills or accidental discharges immediately as required by State Law.  
\* effluent a little cloudy

\*\*WARNING!\*\* You are hereby notified that the following remedial measures must be taken on or before:

mail to permittee  
Official Representative  
Title  
Inspector REDA Date 1/20/07  
Number of NOV's issued on this date: (2) Two One JV NONE

White-Region Yellow-Facility Pink-Charleston Goldenrod-Inspector

STATE OF WEST VIRGINIA  
Department of Environmental Protection  
Environmental Enforcement

NOTICE OF VIOLATION

Violation No. WV-38-001-2135

Addendum \_\_\_\_\_

To the Operator or Agent of:

Facility Name: Snowshoe Mountain Resort Permit No. WV0023711

Permittee or Individual Snowshoe Water And Sewer

Located at or near Snowshoe in Pocahontas County

Representative Bruce Pittet Date 1/20/04 Time 1900

Address / phone number PO Box 10, Snowshoe, WV 26209

Whereas, an inspection made of the above named operation by the undersigned, duly authorized agents of the Secretary, at which the following described condition or practice exists, in violation of Chapter 22 Article 22-11-24, Section(s) 22-11-24 of the Code of West Virginia and/or Section(s) 47-11-2, 3 of the Rules and Regulations promulgated thereunder in that you:

Failed to give immediate notification to the WVDEP Emergency  
notification number (1-800-642-3074) for any spill or accidental  
discharges of pollutants into the waters of the state

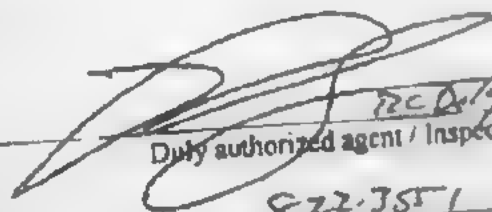
Therefore, pursuant to Chapter, Article, Section(s) 22-11-24 of the Code of West Virginia, you are hereby notified that you are in violation of the provisions of the Code of West Virginia as stated above.

The following remedial measures shall be accomplished on or before Immediately  
Notify the WVDEP Emergency notification number Immediately  
for any spill or accidental discharge of pollutants  
into the waters of the state

Received by:

Signature mail to permittee

Title \_\_\_\_\_

  
Duty authorized agent / inspector

822-3571

Telephone

White - Region Yellow - Facility Pink - Charleston Goldenrod - Inspector

revised May 2002

State of West Virginia  
Division of Environmental Protection  
Environmental Enforcement

# Facility Inspection Report

Time in \_\_\_\_\_  
Time out \_\_\_\_\_  
County Marshall

Facility Name The Town of Sarshe Location Sarshe  
Permit No. WV 56412 / WV 010 2110 Exp. Date 12/2/03 Design Flow 24,000 gpd  
Permittee Sarshe Lake and Sewer Process Flow 721  
Address P.O. Box 10, Sarshe, WV 26209 Weather Sunny  
( ) Municipal Plant ( ) PSD (X) Package Plant ( ) Ponds ( ) Other

Evaluation codes: S-satisfactory M-marginal U-unsatisfactory N/A-not applicable N/O-not observed N/D-not determined

Prelim/Primary	Second/Tert	Other
01 Collection System	16 Pond-Stack	31 Trickling Filter
02 Pump Stations	17 Pond-Polishing	32 Dosing Device
03 Influent	18 Pond-Lagoon	33 Sludge Dewatering
04 Flow Meter	19 Aeration	34 Digester
05 Trash Trap	20 Clarifier (s)	35 Sludge Disposal
06 Grease Trap	21 Scum Removal	36 Trash Disposal
07 Bar Screen	22 Chemical Feeders	37 Ash Disposal
08 Comminutor	23 Filtration	38 Oil Disposal
09 EQ Basin	24 Chlorination	39 General Housekeeping
10 Holding Tank (s)	25 Disinfection	40 Surface H2O Diversion
11 Clarifier (s)	26 Contact Chamber	41 Dike Condition
12 Separator (s)	27 Post Aeration	42 Fence
13 SSO/CSO/Bypasses	28 Dechlorination	43 Records
14 Grit Removal	29 UV	44 Discharge Limitations
15 I&I	30 SBR(s)	45 Auxiliary Power
		46 Laboratory
		47 MSWIS
		48 Chemical Handling
		49 HAZMAT
		50 Stormwater
		51 Nonpoint
		52 Shipping/Receiving
		53 Monitoring Wells
		54 MW reports
		55 SPCC
		56 BMPs
		57 Process Controls
		58 MLSS
		59 Compliance Audit
		60

Discharge #	Flow	pH	Cl2res	DO	Odor	Marker	Appearance	Samples	Photos	Evaluation
001	See Above				S	S	S			M

Receiving Stream / Basin Big Spring / Kanawha

Comments / Deficiencies:

01) EQ Tank has been installed but no air on pump is installed  
02) Only 6" of freeboard in clarifier. \* Effluent line has been extended  
\* plant can only treat 10 gpm / 15,000 gal/day as reported by Sarshe  
- Hanting to Sarshe Village N.O. excess.  
\* Spills are not being reported immediately \* phase I construction upgrade not completed

**\*\*WARNING!\*\*** You are hereby notified that the following remedial measures must be taken on or before:

Mark to permitter  
Official Representative

Title

Inspector

Date

Number of NOV's issued on this date: one (1)

NONE

STATE OF WEST VIRGINIA  
Department of Environmental Protection  
Environmental Enforcement

NOTICE OF VIOLATION

Violation No. WD4-38-002-2135

Addendum \_\_\_\_\_

To the Operator or Agent of:

Facility Name: Snowshoe Mountain Resort / The Inn at Snowshoe Permit No. WV0023311 / WV6550692

Permittee or Individual Snowshoe Water and Sewer

Located at or near Snowshoe in Pocahontas County

Representative Brian Pittet Date 1/20/04 Time 1400

Address / phone number PO Box 10, Snowshoe, WV 26209

Whereas, an inspection made of the above named operation by the undersigned, duly authorized agent of the Secretary, at which the following described condition or practice exists, in violation of Chapter 22, Article \_\_\_\_\_, Section(s) \_\_\_\_\_ of the Code of West Virginia and/or Section(s) \_\_\_\_\_ of the Rules and Regulations promulgated thereunder in that you:

Failed to comply with Phase I Construction Wastewater Treatment  
upgrades At the Snowshoe Village And the Inn at  
Snowshoe

Therefore, pursuant to Chapter, Article, Section(s) 22-11-24 of the Code of West Virginia, you are hereby notified that you are in violation of the provisions of the Code of West Virginia as stated above.

The following remedial measures shall be accomplished on or before Immediately  
Complete All upgrades as Required to the Snowshoe  
Village And the Inn At Snowshoe Wastewater  
Treatment Plants.

Received by:

Signature Mel to Punithan  R. D. Duff  
Duly authorized agent / Inspector

Title \_\_\_\_\_ Telephone 822-3557

State of West Virginia  
Division of Environmental Protection  
Environmental Enforcement  
Facility Inspection Report

Time In 1:45 No  
Time out 1:15  
County Putnam

Facility Name Silvercreek Ski Resort Location Summers  
Permit No. WV00 82937 Exp. Date 12/2/05 Design Flow 1 mgd (1.5 cfs)  
Permittee Snowshoe Lodge & Spa Present Flow 4 cfs  
Address Po Box 10, Snowshoe, WV 26205 Weather Sunny  
( ) Municipal Plant ( ) PSD ( ) Package Plant ( ) Ponds ( ) Other

Evaluation codes: S-satisfactory M-marginal U-unsatisfactory N/A-not applicable N/O-not observed N/D-not determined

Prelim/Primary	Second/Tert	Other
01 Collection System	16 Pond-Stub	31 Trickling Filter
02 Pump Stations	17 Pond-Polishing	32 Dosing Device
03 Influent	18 Pond-Lagoon	33 Sludge Dewatering
04 Flow Meter	19 Aeration	34 Digester
05 Trash Trap	20 Clarifier (s)	35 Sludge Disposal
06 Grease Trap	21 Scum Removal	36 Trash Disposal
07 Bar Screen	22 Chemical Feeders	37 Ash Disposal
08 Comminutor	23 Filtration	38 Oil Disposal
09 EQ Basin	24 Chlorination	39 General Housekeeping
10 Holding Tank (s)	25 Disinfection	40 Surface H2O Diversion
11 Clarifier (s)	26 Contact Chamber	41 Bike Condition
12 Separator (s)	27 Post Aeration	42 Fence
13 SSO/CSO/Bypasses	28 Dechlorination	43 Records
14 Grit Removal	29 UV	44 Discharge Limitations
15 I&I	30 SBR(s)	45 Auxiliary Power
		46 Laboratory
		47 MSDS
		48 Chemical Handling
		49 HAZMAT
		50 Stormwater
		51 Nonpoint
		52 Shipping/Recy
		53 Monitoring Wells
		54 MW reports
		55 SPCC
		56 BMPs
		57 Process Controls
		58 MLSS
		59 Compliance Ass't
		60

Discharge #	Flow	pH	Cl2res	DO	Odor	Marker	Appearance	Sample	Photos	Evaluation
001	SW		—		S	S	M			M
	Above									

Receiving Stream / Basin Black Run

Comments / Deficiencies:

20) clarifier #2 little cloudy

\*\*\*WARNING\*\*\* You are hereby notified that the following remedial measures must be taken on or before:

mail to permitter  
Official Representative

Title

Inspector

Date

NONE

Number of NOV's issued on this date:

White-Region

Yellow-Facility

Pink-Charleston

Goldencod-Inspector



United States Department of Agriculture



Natural Resources Conservation Service  
75 High St. Room 301  
Morgantown, WV 2650

Phone: 304-284-7547  
FAX: 304-284-4838  
E-Mail: peg\_reese@nrcs.usda.gov

## ***NEWS RELEASE***

For Immediate Release

POC: Peg Reese (304) 284-7547

Date: March 12, 2004

### **ENVIRONMENTAL QUALITY INCENTIVES PROGRAM SIGN-UP**

Morgantown, March 12, 2004 –The Natural Resources Conservation Service (NRCS) is still accepting applications for the Environmental Quality Incentives Program (EQIP). The cut-off date for the current ranking period is March 26, 2004.

The EQIP is a voluntary program for farmers who have serious problems involving soil, water, and other related natural resources. Under the program, the USDA Natural Resources Conservation Service (NRCS) offers contracts that provide cost sharing for installation of conservation practices. The cost-share rate for most conservation practices is about 50%, although the highest priority practices can be a maximum of 75%.

Participants that qualify as a Limited Resource Farmer (LRF) may receive up to 90% cost sharing. A LRF is defined as a farmer who: (1) has a total household income at or below the poverty level for a family of four, and (2) has direct or indirect gross farm sales of not more than \$100,000 in each of the previous two years.

Eligible practices include livestock watering facilities, filter strips, manure management facilities, fencing livestock from streams and woodlands, and other conservation practices that reduce soil erosion and improve water quality. Contracts can be as long as 10 years.

The federal government also provides incentive payments for up to 3 years if a farmer agrees to adopt specific management practices. Lillian Woods, NRCS State Conservationist, said, "Incentive programs enable a producer to perform a land management practice that would not otherwise be initiated without financial assistance." An example of a land management practice is "prescribed grazing." A farmer using prescribed grazing develops and implements a plan that balances the number of livestock on his or her grazing lands to the amount of forage that the pasture can realistically be expected to produce. The goal is to maintain a healthy grass cover to reduce soil erosion and at the same time produce healthy livestock. With a planned grazing system, it is also possible to keep cattle on pasture longer which reduces manure handling problems. Producers who develop pasture management plans that result in the best

**ENVIRONMENTAL QUALITY INCENTIVES PROGRAM SIGN UP** page 2

environmental benefits, including water quality, woodland protection and wildlife habitat may also receive payment for applying lime and fertilizer at a rate determined by a soil test

In order to be eligible, landowners must be engaged in livestock or agricultural production. Eligible land includes cropland, pasture, and forestland. Priority will be given to those applicants who will install conservation practices that will result in the most benefit to the soil, water and other natural resources.

Applications can be submitted throughout the year, however, applications submitted after March 26 will not be considered for funding until the next ranking period which is expected to be held in 2004. All applications received before the ranking period cutoff date are evaluated and ranked according to local ranking criteria which is developed with input from Local Working Groups. The highest ranked applications are selected for funding with the dollars available.

Local Working Groups are organized by West Virginia Conservation District boundaries. In West Virginia, the Conservation Districts are based on the major watershed boundaries in the state. Each Conservation District convened Local Working Group meetings to identify and prioritize their natural resource concerns. The Local Working Groups included representatives of the Natural Resources Conservation Service (NRCS), Farm Service Agency (FSA), Conservation Districts, State Conservation Agency, Cooperative Extension, Dept. of Natural Resources, Dept. of Environmental Protection, US Fish and Wildlife, County officials, and other elected officials.

EQIP sign-up information is on the internet on the NRCS West Virginia homepage at [www.wv.nrcs.usda.gov](http://www.wv.nrcs.usda.gov) or available from local NRCS, FSA or Conservation District offices. In addition to the program application form, there is additional application information, a list of practices and costs, and specifics on West Virginia's ranking process, including criteria used to evaluate applications.

NRCS and FSA are co-located in USDA Service Centers. The telephone number is listed under the Federal Government in the blue pages of telephone directories.

#

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, sex, religion, age, disability, political beliefs, sexual orientation, or marital or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720-2600 (voice and TDD).

To file a complaint of discrimination, write USDA, Director, Office of Civil Rights, Room 326W, Whitten Building, 14th and Independence Avenue, SW, Washington, DC 20250-9410 or call (202) 720-5964 (voice and TDD). USDA is an equal opportunity provider and employer.

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Dissell Holl

15 pages

# Bowles Rice McDavid Graff & Love, PLLC

ATTORNEYS AT LAW

800 Quarrier Street  
Charleston, West Virginia 25301

Post Office Box 1386  
Charleston, West Virginia 25325-1386  
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www.bowlesrice.com

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Martinsburg, West Virginia 25401  
Telephone (304) 486-0111

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Martinsburg, West Virginia 25401  
Telephone (304) 225-8700

3 West Placidity Street  
Wechsater, Virginia 22601  
Telephone (540) 723-6177

101 South Queen Street  
Martinsburg, West Virginia 25401  
Telephone (304) 263-0638

7000 Hampton Center, Suite K  
Morgantown, West Virginia 26505  
Telephone (304) 285-2500

Leonard Kneec  
Telephone —(304) 347-1726  
Facsimile —(304) 347-1196

Email Address:  
lkneec@bowlesrice.com

July 11, 2003

Mr. Earl D. "Butch" Michael  
Circuit Clerk  
Pocahontas County Circuit Court  
900-C 10<sup>th</sup> Avenue  
Marlinton, West Virginia 24954

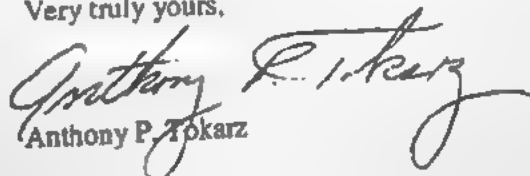
Re: Allyn G. Turner, et al. v. Snowshoe Mountain, Inc. et al.  
Civil Action No.: 03-C-29  
In the Circuit Court of Pocahontas County, West Virginia

Dear Mr. Michael:

Enclosed for filing are one original of a "Motion to Intervene of Waco Oil and Gas Company Inc." and a "Complaint of Intervener Waco Oil and Gas Company Inc." A proposed "Order" is also enclosed for Judge Rowe's review.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Very truly yours,

  
Anthony P. Tokarz

LK/vls  
Enclosures

cc: Joseph A. Lazell, Esquire (w/encl.)  
Robert G. McLusky, Esquire (w/encl.)

1149156

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

ALLYN G. TURNER, DIRECTOR  
DIVISION OF WATER AND WASTE  
MANAGEMENT, WEST VIRGINIA  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

Plaintiff,

v.

Civil Action No.: 03-C-29

SNOWSHOE MOUNTAIN, INC.  
and SNOWSHOE WATER and  
SEWER, INC.

Defendants,  
and

WACO OIL AND GAS COMPANY, INC.,

Intervener Plaintiff.

MOTION TO INTERVENE OF WACO OIL AND GAS COMPANY, INC.

Waco Oil and Gas Company, Inc. ("Waco"), by counsel, hereby moves the Court for an Order authorizing Waco to intervene and file the attached pleading in the above-styled action. In support of its Motion, Waco avers as follows:

1. Rule 24(a) of the West Virginia Rules of Civil Procedure allows intervention as a matter of right where disposition of an existing action may, as a practical matter, impair or impede a non-party's ability to protect its interest unless the applicant's interests are adequately protected by existing parties. As explained below, Waco's interests will not be protected by the Plaintiff in this existing action.

2. Waco is a corporation organized under the State of West Virginia. Waco owns three tracts of real property totaling about 380 acres in Pocahontas County, West Virginia adjacent to a tributary of Big Spring Fork of the Elk River. Big Spring Fork is a pristine

mountain trout stream with special aesthetic and ecological value. Representatives of Waco utilize Big Spring Fork for recreational purposes. Further, the value of Waco's property for recreational development is directly related to the pristine quality of Big Spring Fork.

3. West Virginia/National Pollutant Discharge Elimination System Permits ("WV/NPDES Permit") No. WV0023311 and WV/NPDES Permit No. WV0103110 were issued by the Plaintiff, Allyn G. Turner, Director of Division of Water and Waste Management West Virginia Department of Environmental Protection ("WVDEP") to, Defendants Snowshoe Mountain, Inc. ("Snowshoe Mountain"), and Snowshoe Water and Sewer, Inc., ("Snowshoe Water and Sewer")<sup>1</sup>. Under these WV/NPDES Permits, Snowshoe discharges pollutants from two waste water treatment plants on the Snowshoe Mountain Resort Complex in Pocahontas County, West Virginia into an unnamed tributary of Cupp Run of Big Spring Fork and also directly into Spring Fork.

4. Since about June 2000, Snowshoe's violations of its WV/NPDES Permits limitations and conditions have been numerous and are ongoing. On August 14, 2002, Snowshoe entered into Consent Orders with DEP regarding its noncompliance with WV/NPDES Permits. In these Orders, Snowshoe was only assessed penalties of \$11,000 and \$5,250, amounts far below the average penalty. Snowshoe did not take the actions required by the Consent Orders to ensure compliance with its WV/NPDES Permits and to ensure proper operation and maintenance of the waste water treatment systems.

5. DEP took no action against Snowshoe for its failure to comply with its WV/NPDES Permits and Consent Orders. Indeed, during February 2003, DEP conducted a compliance inspection of Snowshoe Village's waste water treatment plants and found numerous violations.

6. As of April 1, 2003, DEP had still not taken any corrective action against Snowshoe for Snowshoe's WV/NPDES Permits and Consent Order violations. Thus, on April 3,

---

<sup>1</sup> DEP, Snowshoe Mountain and Snowshoe Water and Sewer have so intermingled the names of Snowshoe Mountain and Snowshoe Water and Sewer in the documentation pertaining to these two WV/NPDES Permits that the identities of the actual permit holders are unclear. Thus, for purposes of these WV/NPDES Permits, Snowshoe Mountain and Snowshoe Water and Sewer have essentially become one entity which will be referred to as "Snowshoe".

2003, Russell G. Holt ("Mr. Holt") served his Notice of Intent (the "Notice") to initiate a civil action pursuant to the Federal Water Pollution Control Act, 33 U.S.C. §1365(b) upon Snowshoe, DEP and the United States Environmental Protection Agency ("EPA"). Under the Federal Water Pollution Control Act 33 U.S.C. §1365(b), Mr. Holt could not file his action until 60 days had passed since the serving of the Notice. In response to the Notice and for the purpose of blocking Mr. Holt's suit in federal court, DEP filed the above-styled action, just four days before the expiration of Mr. Holt's 60 day waiting period.

7. The effect of Snowshoe's WV/NPDES Permit noncompliance is devastating to Big Spring Fork and correspondingly to the recreational value of Waco's property. Waco's property is directly downstream from Snowshoe's discharge points. Considering DEP's lax and permissive course of dealing with Snowshoe, DEP clearly cannot be relied upon to protect Waco's recreational and property interests. Moreover, DEP cannot prosecute Waco's common law claims for compensatory damages against Snowshoe in DEP's action brought under the West Virginia Water Pollution Control Act, West Virginia Code §§22-11-1 et al. By law, DEP is limited to pursuing only injunctive relief and civil penalties.

8. Pursuant to 40 CFR § 123.27, in order to maintain its enforcement authority under the Federal Water Pollution Control Act, DEP must provide for public participation in this proceeding by providing either:

(1) Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraphs (a)(1), (2) or (3) of this section by any citizen having an interest which is or may be adversely affected; or

(2) Assurance that the State agency or enforcement authority will:

(i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in §123.26(b)(4);

(ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and

(iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.



### Summary Assessment Report

100-442887-100

1224

8. A 20 turn Wilson stand was constructed in the prisoner's living room when a 1950 1/2 1/2 inch turn stand. The prisoner's turn stand was 1 1/2 3/4 inches from the 1950's 1 1/2 to an electromagnetic difference. The prisoner's turn stand was last utilized approximately 1.5 years ago. Failure to properly repair and maintain the equipment is a violation of Appendix A 1.1 of the 11/1/1975 plan.
9. After several days of pretrial, on Wednesday February 10, 1976, the prisoner reported to the staff that the inmate was ill and had begun to vomit. The family made it stay by the 1/1 program.
10. The Food (Wilson) sample collected by 1950 on this inspection had a value of 20.00 (10.00). Since the building was not connected to the prisoner, the value was used for the 1950's program only.

Appendix A



Distant view of spill from chlorine contact chamber.



Close-up view of spill from chlorine contact chamber.

EPA

## Water Compliance Inspection Report

## Section A: National Data System (Rating 1-5)

Transmittal Code NPLDES WY0103110 WY0103082 Year/Date 03/02/15 Inspection Type Inspection Date

Remarks

Inspection Work Days

Facility Self-Monitoring Evaluation Rating

BI

QA

Remarks

2.5

## Section B: Facility Data

Name and Location of Facility Inspected

The Lin at Shenandoah  
Shenandoah Mountain, Inc.  
P.O. Box 10  
Shenandoah, WV 26289

Entry Time

0800 hrs.

Facility Effective Date

August 1, 2008

Exit time/Date

1630 hrs. February 16, 2009

Facility Reopening Date

December 1, 2008

Name(s) of On-Site Representative(s)/Title/Phone and Fax Number

Lloyd Coleman, Environmental Health & Safety Manager  
Mike Hickman, Chief Operator

On-Site Facility Date

(304) 177-5030

Name, Address of Responsible Official/Telephone/Fax

Bruce Pickett, General Manager  
Shenandoah Mountain Resort  
Shenandoah Valley & River, Inc.  
P.O. Box 10  
Shenandoah, WV 26289

Contacted: Yes ☒ NoSection C: Areas Evaluated During Inspection  
B=Excellent, M=Marginal, U=Unsatisfactory, NA=Not Evaluated

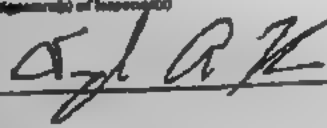
S	Permit	M	Flow Measurement	NA	Pretreatment	U	Operations & Maintenance
M	Records/Reports	N	Laboratory	NA	Compliance Sched	U	Sediment Deposit
U	Facility Review	U	Eff./Rec. Wastes	U	Self-monitoring	N	Pollution Prevention
NA	Pretreatment	NA	Stormwater	NA	CSO/SFO	NA	Malfunction
NA	Other	NA	Other	N	Sampling		

## Section D: Summary of Findings/Comments (attach additional sheets if necessary)

See Attached Report

Compliance Assistance: Troubleshooting      Records/Reports      Flow Measurement      Sampling      (circle all that apply)

Name/Signature of Inspector(s)



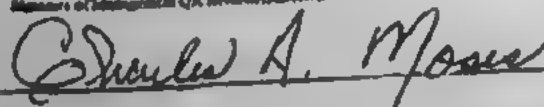
Agency/Office/Telephone/Fax

Dept. of Environmental Protection  
P.O. Box 642, Tampa, WV 25160  
304/777-1001

Date

3-13-09

Signature of Inspection QA Reviewer/Reviewer



Agency/Office/Telephone/Fax

Dept. of Environmental Protection  
P.O. Box 642, Tampa, WV 25160  
304/777-1001

Date

3-13-09

Attachment to EPA Form 3560-3  
WV0103110/WVG550692  
The Inn at Snowshoe  
CSI of February 15-16, 2003  
Page 1

## Introduction

Compliance sampling inspections were conducted on three separate facilities simultaneously. These facilities included:

The Inn of Snowshoe, WV/NPDES permit No. WV0103110, Registration No. WVG550692 issued to Snowshoe Mountain expiring December 12, 2003.

Snowshoe Mountain Resort, WV/NPDES permit No. WV0023311, issued to Snowshoe Water & Sewer Inc. expiring January 16, 2007.

Silver Creek Ski Resort, WV/NPDES permit No. WV0082937, issued to Silver Creek Water & Sewer, Inc. expiring December 10, 2005.

Each of these facilities is operated by the staff headquartered at Snowshoe Mountain Resort. Lloyd Coleman is the Environmental, Health and Safety Manager and Heidi Hickson is the Chief Operator. These inspections were conducted over a busy weekend in order to see how well the facilities operated with a greater load. This report focuses on the findings of The Inn at Snowshoe. Split samples were taken by the permittee, but due to weather conditions and holiday scheduling, the permittee's samples were not analyzed.

## Effluent Characteristics, Result Tables

Parameter	The Inn at Snowshoe Discharge Limitations, 001			DEP
	Avg. Monthly	Max. Daily	Inst. Max	
BOD <sub>5</sub> , mg/l	30.0	60.0	75.0	827①
Lbs./day	Report Only	Report Only	N/A	②
TSS, mg/l	30.0	60.0	75.0	2154①
Lbs./day	Report Only	Report Only	N/A	②
Fecal Coliform, Cts./100 ml	200	400	500.0	<10 / 5,100③
TRC, µg/l	0.0	0.0	0.0	N/A④
pH, Std. Units	Not <6.0 nor >9.0			7.28

① Violation of permit limits.

② Flow was not measured.

③ Although this sample exceeded the six-hour holding by 21 minutes, this office feels this sample is representative of the effluent based on the conditions at the time of sampling and will be considered a violation of permit limits.

④ Ultraviolet disinfection is now used.

Attachment to EPA Form 3560-3  
WV0103110/WVG550692  
The Inn at Snowshoe  
CSI of February 15-16, 2003  
Page 2

## **Records/Reports**

The Third and Fourth Quarter DMRs of 2002 were examined during this inspection. The third quarter Fecal Coliform sample took seven hours to reach the laboratory. This violates the six-hour holding time set by 40 CFR Part 136. Care should be taken not to exceed holding times while transporting samples. Other than this error, these records were in good order. Due to time constraints, operation records were not reviewed during this inspection.

## **Facility Site Review/Operations and Maintenance**

This is a 20,000 gpd extended air facility with an equalization (EQ) basin prior to the plant and an ultraviolet (UV) disinfection. The EQ basin has two pumps installed. Operators state that the tank will overflow if only one pump is running, but that both pumps running will wash solids out the effluent. The operators described this as an upset, conditions beyond their control. This does not meet the definition of an upset as defined in the WV/NPDES permit. This inspector is not convinced that the solids are being properly handled at this facility. Records provided during the inspection do not paint a complete picture but do indicate that no sludge was wasted from this facility during 2001 and 2002. Also since there is no Inflow and Infiltration (I/I) at this facility, even if the cause of the washouts are determined to be hydraulic overloading, improperly designed or inadequate treatment facilities are not included in an upset definition. During this inspection, both pumps were running and solids were being washed out the effluent. The solids were so great in the effluent (See Appendix A for photo), that one could not see the light from the UV bulbs (See Effluent/Receiving Waters for more). A grab sample was taken of Outlet 001 (See Appendix A for photo) and split with the permittee.

## **Flow Measurement**

Flow measurements are taken using a bucket and stopwatch. While this does meet the definition of a flow estimate, a representative 24-hour flow is not given with this measurement. This facility had experimented with other ways of flow measurement, including water meter readings and pump hours. The water readings present a problem because the facility has a pool and this accounts for part of the meter reading. Until a more representative flow reading can be determined, a marginal rating is given for flow measurement.

## **Laboratory**

With the exception of field readings, all permitted parameters are contracted out to REI Consultants Inc., P. O. Box 286, Beaver, WV 25813, (304) 255-2500 or 800-999-0105.

## **Effluent/Receiving Waters**

The receiving stream for this location is Big Spring Fork of the Elk River. This is a high quality stream as defined by 46CSR1.4.1.b.2.C of the Legislative Rules (Water Quality Standards). This stream contained visible sludge beds for approximately 375 ft beginning at Outlet 001 of the Inn at Snowshoe (No sludge was noted upstream from the outfall). These beds were six inches deep in places and contained a large population of sludge worms that turned the

creek bottom red (See Appendix A for photos). A sample was collected and these worms and were positively identified by DEP Wildlife Biologist Janice Smithson as sludge worms, an organism indicative of polluted waters. In addition to the sludge beds, a plume of solids that resembled mixed liquor was flowing in the creek.

### Self-Monitoring Program

Due to the unreported spills that have occurred at this facility, an unsatisfactory rating is given for the self-monitoring program.

### Sludge Disposal

Records supplied by the permittee indicate that no sludge has been wasted from this facility since 2000. Using a formula provided by DEP OWR Engineering Section and an annual average flow from the limited data of permittee records, an estimated 2.75 dry tons of sludge should have been produced in 2002. The receiving stream's condition and the effluent during this inspection suggest that the sludge is being washed into the receiving stream. This program is unsatisfactory.

### Sampling

Sampling was not observed during this inspection.

### Summary

1. The effluent at Outlet 001 violated maximum daily allowable permit limits for BOD<sub>5</sub> concentration. This is a violation of Section A.1 of the WV/NPDES permit.
2. The effluent at Outlet 001 violated maximum daily allowable permit limits for TSS concentration. This is a violation of Section A.1 of the WV/NPDES permit.
3. A Fecal Coliform sample had a result of 5,100 Cts/100ml. This is a violation of Section A.1. of the WV/NPDES permit.
4. The third quarter Fecal Coliform sample took seven hours to reach the laboratory. This violates the six-hour holding time set by 40 CFR Part 136 and is also a violation of Section B.5 of the WV/NPDES permit. Care should be taken not to exceed holding times while transporting samples.

Solids were being washed out the effluent during this inspection. Facility records indicate that no sludge was wasted from this facility during 2001 and 2002. Failure to properly operate and maintain this unit is violations of Appendix A.II.1 of the WV/NPDES permit.

Due to the improper operation of this facility, the receiving stream contained a visible plume of solids beginning at Outlet 001 of the Inn at Snowshoe. Distinctly visible

Sample 5.1051  
Fecal Coliform Multiplying

May 8<sup>th</sup> 6.

Attachment to EPA Form 3560-3  
WV0103110/WVG550692  
The Inn at Snowshoe  
CSI of February 15-16, 2003  
Page 4

floating solids in any waters of the State are a violation of 46CSR1.3.2.a of the Legislative Rules (Water Quality Standards).

7. Due to the improper operation of this facility, the receiving stream contained visible sludge beds for approximately 375 ft beginning at Outlet 001 of the Inn at Snowshoe. Deposits or sludge banks on the bottom of any waters of the State is a violation of 46CSR1.3.2.b of the Legislative Rules (Water Quality Standards).  
may be

8. A sample was collected of the above sludge bed and an abundant population of worms positively identified by DEP Wildlife Biologist Janice Smithson as sludge worms, an organism indicative of polluted waters. Degradation of high quality waters of the State is a violation of 46CSR1.4.b of the Legislative Rules (Water Quality Standards).  
may be

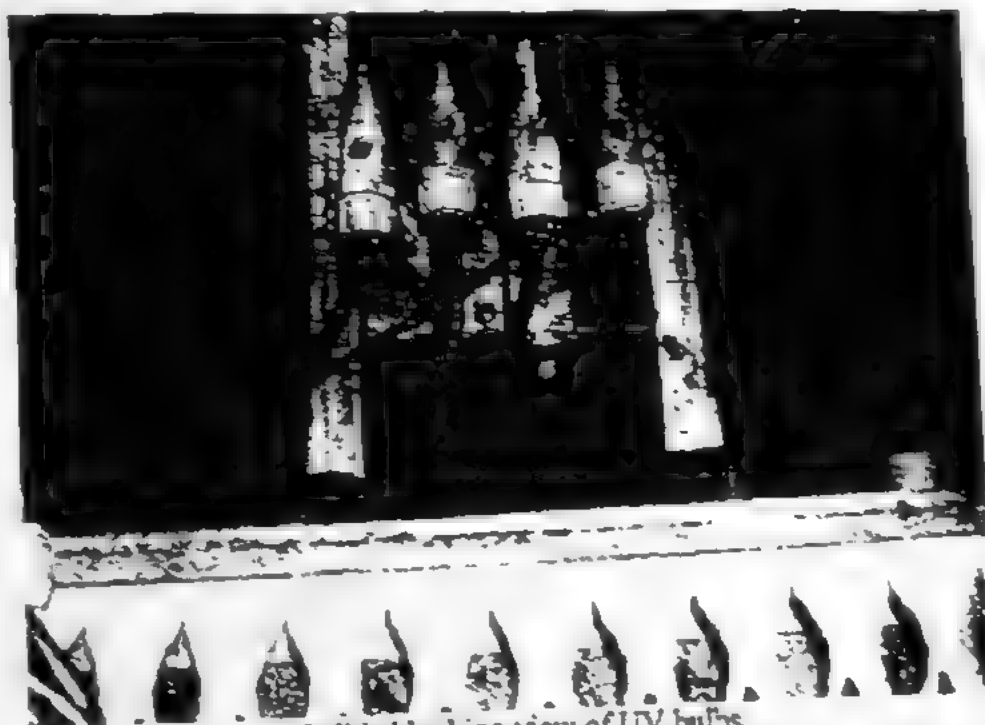
9. In regards to the effluent conditions, at the time of this inspection, the permittee had yet to call the spill line about any type of spill that would have led to the current stream conditions. Failure to report a spill is a violation of 47CSR1.2.2.a of the Legislative Rules (Special Rules).  
would  
require inspection  
to multiply.

10. Flow measurements are taken using a bucket and stopwatch. While this does meet the definition of a flow estimate, a representative 24-hour flow is not given with this measurement.



Attachment to EPA Form 3560-3  
WV0103110/WVG550692  
The Inn at Snowshoe  
CSI of February 15-16, 2003  
Page 5

#### Appendix A

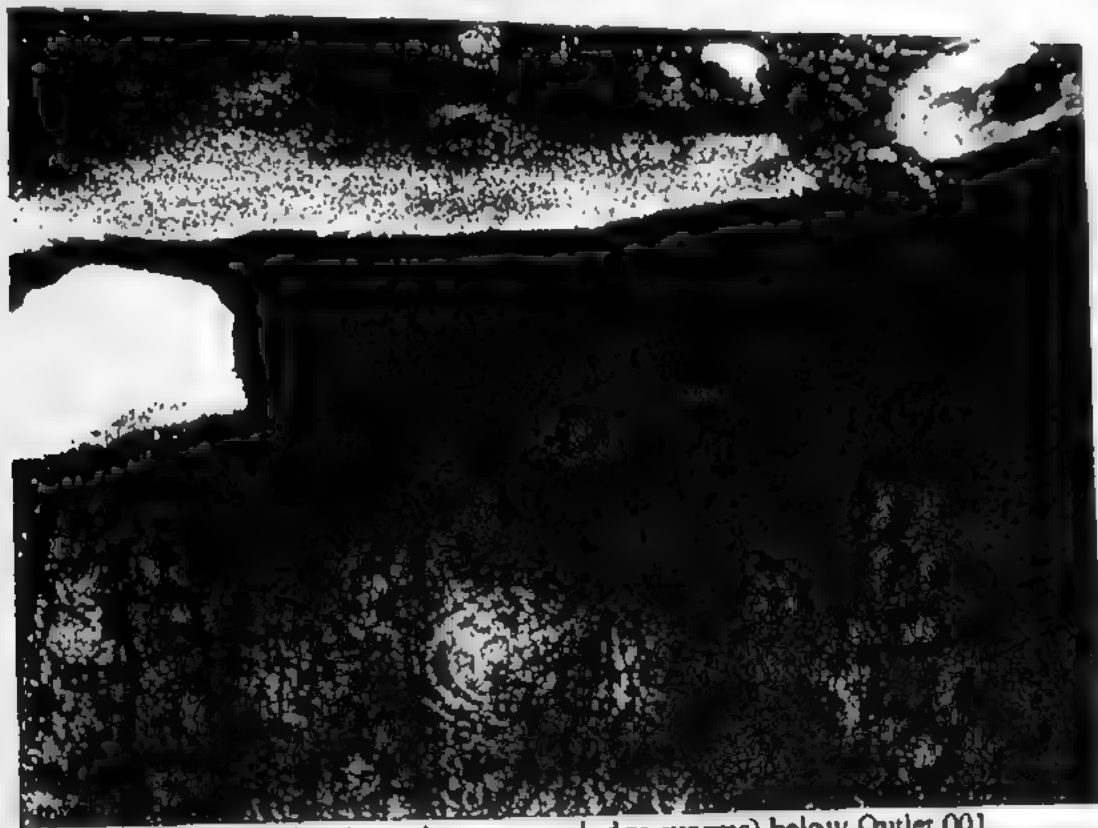


Solids blocking view of UV bulbs.



Grab sample of effluent.

Attachment to EPA Form 3560-3  
WV0103110/WVG550692  
The Inn at Snowshoe  
CSI of February 15-16, 2003  
Page 6



Sludge beds (the red mass are sludge worms) below Outlet 001.



Sludge beds and solids plume below Outlet 001.

# Bowles Rice McDavid Graff & Love LLP

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Anthony P. Tokarz  
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January 15, 2004

E-Mail Address:  
atokarz@bowlesrice.com

Joseph A. Lazell, Esquire  
Office of Legal Services  
WV Department of Environmental Protection  
1356 Hansford Street  
Charleston, West Virginia 25301

Re: DEP v. Snowshoe; and Intervener Waco  
Circuit Court of Pocahontas County, West Virginia  
Civil Action No.: 03-C-29 (Rowe)

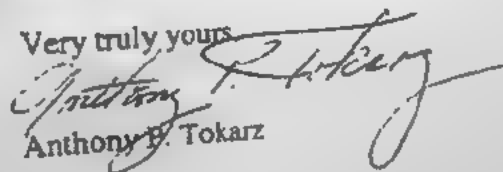
Dear Mr. Lazell:

As you are aware, on October 14, 2003, you served the answers of Plaintiff, Allyn G. Turner, Director of Division of Water and Waste Management, West Virginia Department of Environmental Protection ("DEP") to the First Set of Interrogatories of Intervener, Waco Oil & Gas Company, Inc. ("Waco"). However, DEP did not provide responsive answers to Waco's Interrogatories Nos. 2, 3, 5, 8, 10, 11, 12, 13 and 14. Instead, DEP essentially stated that when it completes its investigative activities it will supplement its answers to those interrogatories as required by the West Virginia Rules of Civil Procedure.

Over three months have passed since DEP served its answers to the interrogatories and no supplemental responses have yet been received. Accordingly, we request that DEP provide its supplemental answers to the interrogatories listed above no later than January 30, 2004, so that it will not be necessary to file a motion for a compelling order.

Your attention to this matter is appreciated.

Very truly yours,

  
Anthony P. Tokarz

APT/rh

cc: Robert McLusky, Esquire  
Leonard Knee, Esquire

3 West Piccadilly Street  
Winchester, Virginia 22801  
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E-Mail Address:  
atokarz@bowlesrice.com

January 20, 2004

Mr. Earl D. Michael  
Circuit Clerk  
Pocahontas County Circuit Court  
900-D 10th Avenue  
Marlinton, West Virginia 24954-1394

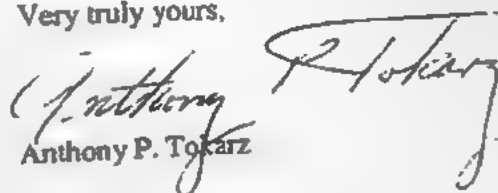
Re: Allyn G. Turner, et al. v. Snowshoe Mountain, Inc., et al.  
Pocahontas County Circuit Court  
Civil Action No. 03-C-29

Dear Mr. Michael:

Enclosed are an original and a copy of the Motion of Intervener Plaintiff, Waco Oil and Gas Company, Inc., For an Order Compelling the Defendants to Respond to Discovery in regard to the above-referenced civil action. Also enclosed is a proposed Order.

Please file the original and date-stamp the copy and return to me in the self-addressed, stamped envelope provided. Thank you for your attention to this matter.

Very truly yours,

  
Anthony P. Tokarz

APT/rh

Enclosures

cc: Joseph A. Lazell, Esquire  
Robert G. McLusky, Esquire  
Honorable James J. Rowe

Bowles Rice  
McDavid Graff & Love LLP

Mr. Earl D. Michael  
January 20, 2004  
Page 2

bcc: Leonard Knee, Esquire  
Ike Morris  
Russell Holt

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

ALLYN G. TURNER, DIRECTOR  
DIVISION OF WATER AND WASTE  
MANAGEMENT, WEST VIRGINIA  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

Plaintiff,

v.

Civil Action No.: 03-C-29

SNOWSHOE MOUNTAIN, INC.  
and SNOWSHOE WATER and  
SEWER, INC.

Defendants,  
and

WACO OIL AND GAS COMPANY, INC.,

Intervener Plaintiff.

**MOTION OF INTERVENER PLAINTIFF, WACO OIL AND GAS COMPANY, INC.,  
FOR AN ORDER COMPELLING THE DEFENDANTS TO RESPOND TO DISCOVERY**

**INTRODUCTION**

Intervener Plaintiff, Waco Oil and Gas Company, Inc. ("Waco"), by counsel, respectfully moves this Court to issue an Order compelling the Defendants, Snowshoe Mountain, Inc. and Snowshoe Water and Sewer, Inc. to adequately respond to Waco's First Set of Interrogatories and Request for Production of Documents served upon the Defendants

As background, West Virginia Department of Environmental Protection ("DEP") in its Complaint against the Defendants requested relief in the form of an assessment of civil penalties against the Defendants, pursuant to West Virginia Code §22-11-22, in an amount not to exceed \$25,000.00 per day of each violation of the West Virginia Water Pollution Control Act

P. 45

("WVWPCA") and the applicable West Virginia/National Pollution Discharge Elimination System ("WV/NPDES") Permits.

On August 22, 2003 Waco served its First Set of Interrogatories and Request for Production of Documents upon the Defendants. Upon review of the Defendants' responses to this discovery, Waco determined that the following discovery responses of Defendants are unacceptable:

**INTERROGATORY NO. 7:** For the years 1996 through the current year 2003 describe the amounts of Snowshoe's net profits or losses.

**ANSWER:** Defendants object to Interrogatory No. 7, as the Defendants' net profits or losses are not relevant to any issue in this action, and they are not reasonably likely to lead to discovery of relevant information.

**REQUEST NO. 2:** Produce a copy of Snowshoe's tax return for each year from 1996 to the present.

**RESPONSE:** Defendants object to Request for Production No. 2, as the Defendants' income tax returns and the information contained therein are not relevant to any issue in this action, and they are not reasonably likely to lead to the discovery of relevant information.

**REQUEST NO. 3:** Produce each and every document which reflects the financial condition of Snowshoe on a yearly basis since 1996.

**RESPONSE:** Defendants object to Request for Production No. 3, as the Defendants' financial condition is not relevant to any issue in this action, and they are not reasonably likely to lead to the discovery of relevant information.

**REQUEST NO. 4:** Produce each and every document which proposes, approves or denies capital investment at Snowshoe since January 1, 1996.

**RESPONSE:** Defendants object to Request for Production No. 4 as information regarding capital investments at Snowshoe is not relevant to any issue in this action and they are not reasonably likely to lead to the discovery of relevant information.

On November 13, 2003, Waco forwarded a letter to the Defendants stating that Waco submits that the information requested in Interrogatory No. 7 and Document Requests 2 through 4 does indeed pertain to relevant issues and/or is likely to lead to relevant information. In its letter Waco pointed that in the enclosed Defendants' August 8, 2003 letter to the DEP, the Defendants' contractor, Draper Aden Associates, cited financial issues and budget concerns as reasons for justifying changes in the work plans for upgrading of the wastewater treatment plants; and that, DEP in its answers to Waco's interrogatories stated that "the DEP believes that any monetary savings realized by a violator for failure/refusal to take appropriate actions to achieve permit compliance is a proper component of any economic benefit resulting from a violation. See copy of Waco's November 13, 2003 letter to the Defendants as attached hereto as Exhibit "A."

The Defendants in their December 1, 2003 letter responding to Waco's letter of November 13, 2003, stated in regard to the economic benefit factor in assessing penalties, that it is not possible to determine the amount of any economic benefit to Defendants by looking at Defendants' profits; and that the only figure relevant to determining any economic benefit to Defendants is the amount that it would have cost Defendants to make changes to their water treatment plants to insure compliance with the NPDES Permits. The Defendants contend that the cost figure is completely unrelated to Defendants' profits and that Defendants continue to object to Waco's discovery requests regarding Defendants' profits. A copy of the Defendants' December 1, 2003 letter is attached hereto as Exhibit "B."

The Defendants' position is erroneous as a matter of law as well as fact.

### ARGUMENT

The "economic benefit" factor does not appear in the WWPCA. It does appear in the list of penalty adjustment factors set forth in DEP's Legislative Rule, 47 CSR §1-6.2.b.6



The economic benefit factor also appears in §1319(d) of the Federal Clean Water Act (CWA), which provides in pertinent part:

Any person who violates . . . this title, or any permit condition or limitation . . . shall be subject to a civil penalty not to exceed \$25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

33 U.S.C. §1319(d).<sup>1</sup>

Neither the CWA nor the DEP's Legislative rule, 44 CSR 1-1, define the term "economic benefit". In any event the Defendants do not appear to be contesting the point that economic benefit to a violator is a proper factor in determining the appropriate penalty. The Defendants do appear to be contesting the method and information to be used in the calculation of the economic benefit.

Courts have been accorded wide discretion in awarding penalties for violations of the CWA. This was emphasized by the Supreme Court when it stated, "Congress [made the] assignment of the determination of the amount of civil penalties to trial judges . . . . Since Congress itself may fix the civil penalties, it may delegate that determination to trial judges. In this case, highly discretionary calculation that take into account multiple factors are necessary in order to set civil penalties under the CWA." Tull v. United States, 481 U.S. 412, 426-27 (1987)

In United States v. Smithville Foods, Inc., 972 F.Supp. 338, 348 (E.D. Va. 1997), the Court recognized that it is difficult to prove the precise economic benefit to a polluter, but

<sup>1</sup> The CWA and the federal court decisions thereunder are relevant to this issue under the WVWPCA. This is because West Virginia administers to the CWA National Pollution Discharge Elimination System ("NPDES") Program in West Virginia. West Virginia is a take over state, meaning that West Virginia has received approval from the United States Environmental Protection Agency ("EPA") to administer the NPDES Program in West Virginia. An element of West Virginia's take over of the NPDES Program is that West Virginia's statutes and regulations, in West Virginia programs must be consistent with the federal statutes, regulations and programs. See West Virginia Code §22-11-4(a)(1).

40 CFR Part 136 and its applicable WV/NPDES permit. Defendant Snowshoe Mountain is further liable for any unlawful violations subsequent to the 3<sup>rd</sup> Quarter 2002.

**Eleventh Claim for Relief**  
**(Monitoring and Reporting Violations)**  
**(Silver Creek)**

61. Paragraphs 1 through 20 are realleged and incorporated herein by reference.

62. WV/NPDES permits issued pursuant to the WPCA require a permittee to comply with the terms and conditions of the permit. Any permit noncompliance constitutes a violation of the WPCA and the applicable WV/NPDES permit.

63. WV/NPDES Permit No. WV0082937 issued to Snowshoe Water and Sewer and the WPCA require, *inter alia*, that the permittee record the date, exact place, and time of sampling or measurement for each sample or measurement taken pursuant to the permit.

64. Snowshoe Water and Sewer failed to comply with the requirement in paragraph 63 above when it failed to record the sampling time for the November 2002 Fecal Coliform sample at the Silver Creek facility. Defendant Snowshoe Water and Sewer is further liable for any unlawful violations subsequent to November 2002.

**Twelfth Claim for Relief**  
**(Other Reporting Violations)**  
**(Snowshoe Village)**

65. Paragraphs 1 through 20 are realleged and incorporated herein by reference.

66. WV/NPDES permits issued pursuant to the WPCA require a permittee to comply with the terms and conditions of the permit. Any permit noncompliance constitutes a violation of the WPCA and the applicable WV/NPDES permit.

67. WV/NPDES Permit No. WV0023311 issued to Snowshoe Mountain and the WPCA require, *inter alia*, that the permittee immediately report any spill from the Snowshoe Village facility and thereafter provide to the WVDEP a written report of the circumstances surrounding the spill within five (5) days of its occurrence.

68. Beginning approximately December 2002 and continuing until at least February 2003, Snowshoe Mountain has failed to comply with the requirement in paragraph 67 above by failing to report a spill from underground chlorine contact tanks as required by 47 CFR § 11.2.2.a and its applicable WV/NPDES permit. Defendant Snowshoe is further liable for any unlawful violations subsequent to February 2003.

Thirteenth Claim for Relief  
(Other Reporting Violations)  
(Inn at Snowshoe)

69. Paragraphs 1 through 20 are realleged and incorporated herein by reference.

70. WV/NPDES permits issued pursuant to the WPCA require a permittee to comply with the terms and conditions of the permit. Any permit noncompliance constitutes a violation of the WPCA and the applicable WV/NPDES.

71. General Permit No. WV0103110 issued to Snowshoe Mountain and the WPCA require, *inter alia*, that the permittee immediately report any spill from the Inn at Snowshoe facility and thereafter provide to the WVDEP a written report of the circumstances surrounding the spill within five (5) days of its occurrence.

72. Snowshoe Mountain failed to comply with the requirement in paragraph 71 above when it failed to report, as required by 47 CFR § 11.2.2.a and its applicable WV/NPDES permit.

1  
a spill that occurred in February 2003. Defendant Snowshoe is further liable for any unlawful violations subsequent to February 2003.

**Fourteenth Claim for Relief**  
**(Other Requirements Violations)**  
**(Snowshoe Village)**

73. Paragraphs 1 through 20 are realleged and incorporated herein by reference.

74. WV/NPDES permits issued pursuant to the WPCA require a permittee to comply with the terms and conditions of the permit. Any permit noncompliance constitutes a violation of the WPCA, the underlying rules, and the applicable WV/NPDES permit.

75. WV/NPDES Permit No. WV0023311 issued to Snowshoe Mountain and the WPCA require, *inter alia*, that the permittee implement a program that identifies and eliminates sources of inflow and infiltration.

76. Snowshoe Mountain failed to comply with the requirement in paragraph 75 above when a lagoon associated with the Snowshoe Village facility overflowed following several days of precipitation in February 2003. Defendant Snowshoe Mountain is further liable for any unlawful violations subsequent to February 2003.

**Relief Requested**

Wherefore, the WVDEP prays that this Court:

a. Permanently enjoin Defendants from any and all ongoing and future violations of the WPCA and the applicable WV/NPDES permit issued to the Defendants pursuant to Section 8 of the WPCA, and from discharging pollutants except as expressly authorized by a WV/NPDES permit issued under Section 8 of the WPCA.

b. Permanently enjoin Defendants from failing to comply with the terms and conditions of the applicable WV/NPDES permit issued to the Defendants, pursuant to Section 8 of the WPCA.


c. Assess civil penalties against the Defendants, pursuant to W. Va. Code § 22-11-22, a civil penalty in an amount not to exceed \$25,000 per day for each violation of the WPCA and the applicable WV/NPDES permit.

d. Award the WVDEP all costs and disbursements, including attorney, witness, and consultant fees, incurred by the WVDEP in this action; and

e. Grant such other relief as appropriate.

WALLYN G. TURNER, DIRECTOR,  
DIVISION OF WATER RESOURCES,  
WEST VIRGINIA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,

By Counsel

  
Joseph A. Lazell (WVSB No. 2165)  
Office of Legal Services/WVDEP  
1356 Hanford Street  
Charleston, WV 25301  
(304) 558-9160



Environmental Enforcement  
1356 Hansford Street  
Charleston, WV 25301-1401  
Telephone Number 304-558-2497  
Fax Number 304-558-2948

## West Virginia Department of Environmental Protection

Bob Wise  
Governor

Stephanie R. Timmerman  
Acting Cabinet Secretary

March 18, 2003

Mr. Bruce Pittet, General Manager  
Snowshoe Mountain Resort (Snowshoe)  
Snowshoe Water & Sewer, Inc.  
PO Box 10  
Snowshoe, WV 26209

**CERTIFIED RETURN RECEIPT REQUESTED**

**RE: Inspection Reports; Notice of Violation**

Dear Mr. Pittet:

Enclosed are three compliance sampling inspection reports recently conducted at Snowshoe's facilities located in Pocahontas County, West Virginia. These facilities are Silvercreek Ski Resort (WV0082937), Snowshoe (WV0023311), and the Inn at Snowshoe (WV0103110, WV0550692). As reflected by these inspection reports, there are multiple instances of noncompliance at all of these facilities. Therefore, this correspondence also serves as a Notice of Violation for the noncompliance reflected in these inspection reports.

It is acknowledged Snowshoe is in the process of working with state and local officials to provide a long-term solution to meet its wastewater treatment needs. However, it is also incumbent upon Snowshoe to comply with its existing permits and/or Orders. With this in mind, Snowshoe shall advise WVDEP of immediate measures to be taken to address the noncompliance identified in these inspection reports. Please submit these proposed corrective measures to Mr. Pravin Sangani, Division of Water and Waste Management - Permits Section, 1201 Greenbrier Street, Charleston, WV 25311, within twenty (20) days of receipt of this correspondence. I ask that you provide me a copy of these proposed measures as well.

Sincerely,

Michael A. Zeto  
Chief Inspector

MAZ/mks

Enclosures

CC w/enclosures:

Pravin Sangani, Permits, DWWM  
Charlie Moses, EIS, EB  
Northeast Region, EE  
Sharon McCauley, US EPA, Region III



West Virginia Department  
of Environmental Protection

"Promoting a healthy environment."

EPA

## Water Compliance Inspection Report

## Section A: National Data System Coding (4-PCB)

Transaction Code NPDES Year/day Inspection Type Inspector Fac Type  
 N 5 WV0082937 03/02/13 S S J

Inspection Work Days Facility Self-Monitoring Evaluation Rating BI QA Reserved  
 2.5

## Section B: Facility Data

## Name and Location of Facility Inspected

Shenandoah Ski Resort  
 Shenandoah Water & Sewer, Inc.  
 P.O. Box 10  
 Shenandoah, WV 26089

## Entry Time

0930 hrs.

## Permit Effective Date

January 11, 2001

## Exit time/Date

1:00 hrs. February 14, 2003

## Permit Expiration Date

December 10, 2003

## Name(s) of On-Site Representative(s) Title/Phone and Fax Number

Larry Coleman, Environmental Health & Safety Manager  
 Heidi Nichols, Chief Operator

## Other Facility Data

(800) 573-6490

## Name, Address of Responsible Official/Telephone/Fax

Steve Plett, General Manager  
 Shenandoah Mountain Resort  
 Shenandoah Water & Sewer, Inc.  
 P.O. Box 10  
 Shenandoah, WV 26089

Completed: Yes ☒Section C: Areas Evaluated During Inspection  
 B=Basic, M=Marginal, U=Unsatisfactory, N=Not Evaluated

S	Permit	U	Flow Measurement	NA	Pretreatment	M	Operations & Maintenance
M	Records/Reports	N	Laboratory	NA	Compliance Sched	M	Sediment Disposal
S	Fac Site Review	U	RR/ Rec. Wastes	U	Self-monitoring	N	Pollution Prevention
NA	Pretreatment	N	Stormwater	NA	CSO/SSO	NA	Multimedia
NA	Other	NA	Other	N	Sampling		

## Section D: Summary of Findings/Comments (attach additional sheets if necessary)

See Attached Report

Compliance Assistance: Troubleshooting

Facility Inspection

Flow Measurement

Sampling

(circle all that apply)

## Name/Signature(s) of Inspector(s)

## Agency/Office/Telephone/Fax

Dept. of Environmental Protection  
 P.O. Box 603, Tyngs, WV 25549  
 304/757-1403

## Date

3-13-03

## Signature of Management QA Reviewer/Inspector

## Agency/Office/Phone/Fax

Dept. of Environmental Protection  
 P.O. Box 603, Tyngs, WV 25549  
 304/757-1403

## Date

3-13-03

Attachment to EPA Form 3560-3  
WV0082937  
Silver Creek Ski Resort  
CSII of February 15-16, 2003  
Page 1

## Introduction

Compliance sampling inspections were conducted on three separate facilities simultaneously. These facilities included:

- The Inn of Snowshoe, WV/NPDES permit No. WV0103110, Registration No. WVG550692 issued to Snowshoe Mountain expiring December 12, 2003.
- Snowshoe Mountain Resort, WV/NPDES permit No. WV0023311, issued to Snowshoe Water & Sewer Inc. expiring January 16, 2007.

Silver Creek Ski Resort, WV/NPDES permit No. WV0082937, issued to Silver Creek Water & Sewer, Inc. expiring December 10, 2005.

Each of these facilities is operated by the staff headquartered at Snowshoe Mountain Resort. Lloyd Coleman is the Environmental, Health and Safety Manager and Heidi Hickson is the Chief Operator. These inspections were conducted over a busy weekend in order to see how well the facilities operated with a greater load. This report focuses on the findings of the Silver Creek Resort plant. Split samples were taken by the permittee, but due to weather conditions and holiday scheduling, the permittee's samples were not analyzed.

## Effluent Characteristics, Result Tables

Parameter	Silver Creek Ski Resort Discharge Limitations, 001		DEP
	Avg. Monthly Report Only	Max. Daily Report Only	
Flow, MGD			0.083
BOD <sub>5</sub> , mg/l	20.0	40.0	608①
Lbs./day	16.68	33.36	421.88①
TSS, mg/l	30.0	60.0	869①
Lbs./day	25.02	50.04	601.54①
NH <sub>3</sub> -N, mg/l	6	12	27.1①
Lbs./day	5	10	18.80①
Fecal Coliform, Cts./100 ml	200	400	5,400①
Dissolved Oxygen, mg/l	Not <7 at any given time		4.83②
pH, Std. Units	Not <6.0 nor >9.0		6.77
Cu, Total Rec., µg/l	N/A	Report Only	485
Pb, Total Rec., µg/l	N/A	Report Only	<5
Zn, Total Rec., µg/l	N/A	Report Only	240

① Violation of permit limits.

② For information only, sample taken prior to effluent cascade.



Attachment to EPA Form 3560-3  
WV0082937  
Silver Creek Ski Resort  
CSJ of February 15-16, 2003  
Page 2

### **Records/Reports**

The November and December 2002 DMRs were examined during this inspection. On the November DMR, BOD and  $\text{NH}_3\text{-N}$  were reported as hard numbers, while the laboratory sheets show these results as less than their respective minimum detection levels (<MDL). Lead was reported as "ND" instead of <MDL. Both of these results should have been reported as <MDL. Both the November and December DMRs had Fecal Coliform results reported as "1", these should also be reported as <MDL. The sampling time for Fecal Coliform was not recorded for the November sample.

### **Facility Site Review/Operations and Maintenance**

During this inspection, both sides of the plant were in service and the upgraded Ultraviolet (UV) system was onsite but not installed. As shown in the table above, the flow during this inspection was 0.083 MGD, well within the 0.1 MGD designed limit. By the end of the 24-hour sampling period, solids were being washed out of the clarifiers with the effluent (See Appendix A for photos). The solids were so great in the effluent; the UV lights could not be seen (See Appendix A for photo). Before this occurrence, built up solids were noticed on the weirs of the clarifiers, so this inspector doubts that this was an isolated event.

### **Flow Measurement**

Even though a DEP meter could not be set up to check the permittee's totalizer, an unsatisfactory rating is given for flow measurement because the permittee's Doppler flow meter was last calibrated in 1999.

### **Laboratory**

With the exception of field readings, all permitted parameters are contracted out to REI Consultants Inc., P. O. Box 286, Beaver, WV 25813, (304) 255-2500 or 800-999-0105.

### **Effluent/Receiving Waters**

Due to the Section A permit violations presented in the above table, an unsatisfactory rating is given for the effluent. Both BOD and TSS concentrations increased in effluent compared to the influent (See Appendix A for photo). Due to the snow depth, the receiving waters could not be reached during the inspection.

### **Self-Monitoring Program**

Based on flow calibration records, DMR errors and the sludge program, an unsatisfactory rating is given for the self-monitoring program.

Attachment to EPA Form 3560-3  
WV0082937

Silver Creek Ski Resort  
CSI of February 15-16, 2003  
Page 3

### Sludge Disposal

The Sewage Sludge Management Reports that the permittee submits to DEP report that no sludge was generated for the facility during 2002. The last time sludge was generated by this facility appears to be September 2001. The maximum period sludge can be stored at this facility is one year. Using a formula provided by DEP OWR Engineering Section and an annual average flow from permittee records, an estimated 4.86 dry tons of sludge should have been produced in 2002. The drying beds were not examined due to a lack of time and weather conditions. This program is rated as unsatisfactory.

### Sampling

Sampling was not observed during this inspection.

### Summary

1. The effluent at Outlet 001 violated maximum daily allowable permit limits for BOD<sub>5</sub> concentration. This is a violation of Section A.1 of the WV/NPDES permit. ✓
2. The effluent at Outlet 001 violated maximum daily allowable permit limits for BOD<sub>5</sub> loadings. This is a violation of Section A.1 of the WV/NPDES permit.
3. The effluent at Outlet 001 violated maximum daily allowable permit limits for TSS concentration. This is a violation of Section A.1 of the WV/NPDES permit. ✓
4. The effluent at Outlet 001 violated maximum daily allowable permit limits for TSS loadings. This is a violation of Section A.1 of the WV/NPDES permit.
5. The effluent at Outlet 001 violated maximum daily allowable permit limits for NH<sub>3</sub>-N concentration. This is a violation of Section A.1 of the WV/NPDES permit.
6. The effluent at Outlet 001 violated maximum daily allowable permit limits for NH<sub>3</sub>-N loadings. This is a violation of Section A.1 of the WV/NPDES permit.
7. A Fecal Coliform sample had a result of 5,400 Cts./100ml. This is a violation of Section A.1. of the WV/NPDES permit.
8. The sampling time for Fecal Coliform was not recorded for the November sample. ✓  
Failure to record the time of sampling is a violation of Appendix A.III.4.a of the WV/NPDES permit.
9. On the November DMR, BOD and NH<sub>3</sub>-N were reported as hard numbers, while the laboratory sheets show these results as less than their respective minimum detection levels (<MDL). Lead was reported as "ND". Both the November and December DMRs had Fecal Coliform results reported as "1". These results should have been reported as less than their respective minimum detection levels.

Attachment to EPA Form 3560-3  
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Silver Creek Ski Resort  
CSI of February 15-16, 2003  
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10. Solids were being washed out of the two clarifiers with the effluent. Failures to properly operate and maintain these units are violations of Appendix A.II.1 of the WV/NPDES permit.
11. The permittee's Doppler flow meter was last calibrated in 1999. Failure to initiate appropriate quality assurance procedures is a violation of Appendix A.II.1 of the WV/NPDES permit.
12. *not  
substantiated* The Sewage Sludge Management Reports that the permittee submits to DEP indicate that no sludge was generated for the facility since September 2001. Storage of sewage sludge at this facility for greater than one year is a violation of 33CSR2.3.3.a.1 of the Legislative Rules (Sewage Sludge Management Rule). *not substantiated*

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Appendix A



Solids in the effluent of a clarifier.



Solids at the discharge of the UV disinfection unit.



Solids blocking view of UV bulbs.



Influent composite samples first three on left. Effluent composite samples last three on right.

EPA

# Water Compliance Inspection Report

## Section A: National Data System Coding or PCBs

Transaction N Code S NPD89 WV0603311 Yr/Mo/Day 8/02/13 Inspection Type S Inspector I Pcr Type I

Remarks

Inspection Work Days Facility Self-Monitoring Evaluation Rating 01 QA Reserved

2.5

## Section B: Facility Data

### Name and Location of Facility Inspected

Shenandoah Mountain Resort  
Shenandoah Water & Sewer, Inc.  
P.O. Box 10  
Barnesville, WV 26030

### Entry Time

0910 hrs

Permit Effective Date  
February 14, 2000

### Exit Time/Date

1130 hrs. February 16, 2003

Permit Expiration Date  
January 16, 2003

### Name(s) of On-Site Representative(s)/Title/Phone and Fax Number

Lloyd Coleman, Environmental Health & Safety Manager  
McE Rickman, Chief Operator

### Other Facility Data

(304) 572-5400

### Name, Address of Responsible Official/Telephone/Fax

Shenandoah Pinct. General Manager  
Shenandoah Mountain Resort  
Shenandoah Water & Sewer, Inc.  
P.O. Box 10  
Barnesville, WV 26030

Confided: Yes ☒ No

## Section C: Areas Evaluated During Inspection 2-Secondary, 1-Midrange, 1-Underground, 1-Not Evaluated

S	Permit	U	Flow Measurement	NA	Pretreatment	U	Operations & Maintenance
M	Records/Reports	N	Laboratory	NA	Compliance Sched	N	Sludge Deposit
U	Fac Site Review	U	DE/ Rec. Waters	U	Self-monitoring	N	Pollution Prevention
NA	Pretreatment	M	Stormwater	NA	CSO/SSO	NA	Media
NA	Other	NA	Other	S	Sampling		

## Section D: Summary of Findings/Comments (attach additional sheets if necessary)

See Attached Report

Compliance Assistance, Troubleshooting Records/Reports Flow Measurement Sampling (circle all that apply)

Inspector(s) <i>[Signature]</i>	Agency/Officer/Telephone/Fax Dept. of Environmental Protection P.O. Box 462, Tyngs, WV 26109 304/717-1000	Date 2-15-03
Inspector(s) <i>[Signature]</i>	Agency/Officer/Telephone/Fax Dept. of Environmental Protection P.O. Box 462, Tyngs, WV 26109 304/717-1000	Date 2-12-03

Attachment to EPA Form 3560-3  
WV0023311  
Snowshoe Mountain Resort  
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## Introduction

Compliance sampling inspections were conducted on three separate facilities simultaneously. These facilities included:

The Inn of Snowshoe, WV/NPDES permit No. WV0103110, Registration No. WVG550692 issued to Snowshoe Mountain expiring December 12, 2003.

Snowshoe Mountain Resort, WV/NPDES permit No. WV0023311, issued to Snowshoe Water & Sewer Inc. expiring January 16, 2007.

Silver Creek Ski Resort, WV/NPDES permit No. WV0082937, issued to Silver Creek Water & Sewer, Inc. expiring December 10, 2005.

Each of these facilities is operated by the staff headquartered at Snowshoe Mountain Resort. Lloyd Coleman is the Environmental, Health and Safety Manager and Heidi Hickson is the Chief Operator. These inspections were conducted over a busy weekend in order to see how well the facilities operated with a greater load. This report focuses on the findings of the Snowshoe Mountain Resort. Split samples were taken by the permittee, but due to weather conditions and holiday scheduling, the permittee's samples were not analyzed.

## Effluent Characteristics, Result Tables

Parameter	Snowshoe Mountain Resort Discharge Limitations, 001		DEP
	Avg. Monthly	Max. Daily	
Flow, MGD	0.55	Report Only	0.277
BOD <sub>5</sub> , mg/l	20.0	40.0	29 ✓
Lbs./day	92	184	67
TSS, mg/l	30.0	60.0	112⓪
Lbs./day	138	276	259
NH <sub>3</sub> -N, mg/l	4.3	7.2	31.9⓪
Lbs./day	19.7	33	74⓪
Fecal Coliform, Cts./100 ml	200	400	30,000⓪ ✓
Dissolved Oxygen, mg/l	Not <6 at any given time		N/A
TRC, µg/l	zero	zero	<100
pH, Std. Units	Not <6.0 nor >9.0		N/A
Cu, Total Rec., µg/l	Report Only	Report Only	19
Pb, Total Rec., µg/l	Report Only	Report Only	<5
Zn, Total Rec., µg/l	Report Only	Report Only	90

① Violation of permit limits.

② Exceeded holding time (for information only).

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WV0023311

Snowshoe Mountain Resort  
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### Records/Reports

The November and December 2002 DMRs were examined during this inspection. On the November DMR, Lead and TRC were reported as zero. Both of these results should have been reported as less than their respective minimum detection levels (<MDL). Both the November and December DMRs had Fecal Coliform results reported as "1", these should also be reported as <MDL. The sampling time for Fecal Coliform was not recorded for the December sample.

### Facility Site Review/Operations and Maintenance

This facility has underground septic tanks that are used for chlorine contact tanks. During this inspection, water was overflowing from a manhole and from cracks in the ground in the area of the chlorine tanks (See photo in Appendix A). This discharge had a TRC result of 0.73 mg/L. An average flow taken from three bucket and stopwatch measurements was 16.6 gpm. This calculates to 23904 gpd with a continuous 24-hour flow. Operators stated to DEP Inspector R. Dolly that this spill occurs every time the flow gets to 180 gpm and began mid December. According to the permittee's records, there were 55 days from December 15, 2002 to the date of the inspection where the flow exceeded this amount. The exact cause of this spill is unknown, but this facility should be able to handle this amount of flow. One cause could be a build up of solids causing a restriction in the unit and a decreased holding time. This would explain the high Fecal Coliform result even though there was chlorine present. At the time of this inspection, the permittee had yet to call in a spill because of this unit.

This facility has an Inflow and Infiltration (I/I) problem. There is an equalization (EQ) basin at the headworks of the plant to help minimize the effect of I/I but the problem still exists and causes problems with the lagoon. After several days of precipitation, on Wednesday February 19, 2003, the permittee reported to the spill line that the lagoon was full and had begun to overflow. This facility needs to step up the I/I program.

### Flow Measurement

A 25-hour totalizer check was conducted on the permittee's flow meter using a DEP ISCO Bubbler flow meter. The permittee's totalizer was 12.9 % higher than the DEP's. This is an unacceptable difference. The permittee's flow meter was last calibrated approximately 1.5 years ago. Operator notes document that the meter went "haywire" on January 13, 2003 and then appeared normal the following day. No check was conducted on the flow meter by the staff to confirm the meter was indeed accurate. Flow measurement is rated as unsatisfactory for this facility.

### Laboratory

With the exception of field readings, all permitted parameters are contracted out to REI Consultants Inc., P. O. Box 286, Beaver, WV 25813, (304) 255-2500 or 800-999-0105.



### Effluent/Receiving Waters

In addition to the Section A permit violations presented in the table above, the effluent is rated as unsatisfactory because of the spill of chlorinated water that bypassed final treatment.

### Self-Monitoring Program

Due to the unreported spills that have occurred at this facility, an unsatisfactory rating is given for the self-monitoring program.

### Sampling

Sampling was not observed during this inspection.

### Summary

1. The effluent at Outlet 001 violated maximum daily allowable permit limits for TSS concentration. This is a violation of Section A.1 of the WV/NPDES permit.
2. The effluent at Outlet 001 violated maximum daily allowable permit limits for  $\text{NH}_3\text{-N}$  concentration. This is a violation of Section A.1 of the WV/NPDES permit.
3. The effluent at Outlet 001 violated maximum daily allowable permit limits for  $\text{NH}_3\text{-N}$  loadings. This is a violation of Section A.1 of the WV/NPDES permit.
4. The sampling time for Fecal Coliform was not recorded for the December sample. Failure to record the time of sampling is a violation of Appendix A.III.4.a of the WV/NPDES permit.
5. On the November DMR, Lead and TRC were reported as zero. Both the November and December DMRs had Fecal Coliform results reported as "1". These results should have been reported as less than their respective minimum detection levels (<MDL).
6. A spill from the underground chlorine contact tanks was occurring during this inspection. This discharge had a TRC result of 0.73 mg/l and an average flow of 16.6 gpm. Operator statements and facility records show that this spill has occurred at least 55 days from December 15, 2002 to the date of the inspection. At the time of this inspection, the permittee had yet to call in a spill because of this unit. Failure to report a spill is a violation of 47CSR11.2.2.a of the Legislative Rules (Special Rules).
7. The exact cause of the above spill is unknown. One cause could be a build up of solids causing a restriction in the unit and a decreased holding time. This would explain the high Fecal Coliform result even though there was chlorine present. Allowing this spill to continue is a violation of Appendix A.II.1 of the WV/NPDES permit.

71 pages

3-15-4

B.T.L.  
You seem to be having  
difficulty in distinguishing  
"RUBAIST" from the truth. So  
here's an example (enclosed)  
of 2 pages of "RUBAIST" put  
in your paper in March 03  
and here's 66 pages (9  
th-appears) of the truth of  
SUNSHINE'S ENVIRONMENT FOOTPRINT  
THAT HAS RAKED UP 97 violations  
of the Clean Water Act, 21 (March 1973)  
enclosed was released the time  
of your "RUBAIST" was printed.  
and see also the obvious violation  
(enclosed) also a lawsuit  
Buy WUDEP Against SUNDRIKE  
All WUDEP portions in your paper.  
and let's not forget the  
IK's means, intention, meaning  
misreported. However, you do  
have times to report on IK's means  
Brown Mountain property.

So let's score 2 pages of

"Rabbit" and to prove the truth.

With it I always think  
pay to have the truth paid  
in your paper?

And Bill a little more

Truth for you to look at -  
Snowshoes "Rabbit" or is it

Effluent?

W/ to my 10,000 Snowshoes

would have succeeded in denying  
the public, equal access to a

Public Utility and the

Community would not have a

\$12M Region seen put that

saves all the people. This is

called and is the truth, Bill.

you have a great environment

Story of Pollution -

Headline: "Resort - Pollutes

Environment - year after year"

However you have chosen

not to print this truth, is the

Because as you told me last time

you lost control "I don't care

if Snowshoe breaks the law?"

So I realize that the truth  
for me comes at a price.  
The "Pou Hunter" times and  
"Quarist" from Soudier Gals  
Printed for How much?

So Please contact with A  
Price for that is weeks paper.

I actually thought in letter  
would be printed (as I had  
spoke over 1000) Part the  
truth (you want) as a courtesy  
to that on peaches A  
\$12M given part of this time  
fighting to save the financial  
stability of the Co. from Soudier

I also called 3 times to thank you  
for printing my letter, however  
you were always "out".  
For my was the last time I called.  
Bill Watters already upset  
over 3 months with

# Snowshoe vows to reduce 'environmental footprint'

by Pamela Pritt  
Managing Editor

**S**nowshoe Mountain Resort vowed to reduce its impact on the environment last month in an official signing ceremony held at the Mountain Lodge.

Resort General Manager Bruce Pittet signed a Memorandum of Agreement with Acting DEP Secretary Stephanie Thurnermeier.

"I think this is incredibly innovative," Pittet said. "It makes sense for us."

The MOA says the resort will "recognize the importance of promoting sustainable business practices in West Virginia." Further, the resort will identify environmental aspects of its own activities, products, processes and services and establish environmental programs to address those aspects.

The DEP will provide technical and financial assistance, as well as guidance in all stages of the environmental program. The state agency will also implement environmental outreach and educational and will focus on assisting businesses to develop a formal environmental policy and create a structured set of best practices designed to contribute to the improvement of their overall environmental performance.

See Environment, on page 8

ting crazy. Use the Snow Bucks at the Snow Bash Auction to bid on great prizes like skis, snowboards, trips, jackets and other cool stuff.

**Mardi Gras Fat Tuesday Party: March 4**  
Party down in the mountain New Orleans style. Themed costume parties and much more take

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e slopes  
tion



Day Weekend at  
very excellent, and  
during Saturday &

e - the slopes are

e people and for the  
for a long time!"



Scenes like this are what the Memorandum of Agreement signed by Snowshoe Mountain Resort and the Department of Environmental Protection hope to preserve.

Photo by William Michael

*Environment, from page 1*

"We have to protect what we have here," said Jim Hays, Snowshoe's Vice President of Risk Management. "We provide the opportunity for anyone to come to the facility and place them in the wilderness."

Environmental Director Joe Stevens noted that the resort is recycling all paper products, oil, oil

filters and tires, as well as many other products used by the resort.

In a letter, former DEP Secretary Michael Callaghan wrote, "Environmental Management Systems are true assets to the efficiency and efficacy of businesses throughout the state. They also create a competitive advantage as surrounding communities and associations encourage the imple-

mentation of such programs in businesses nationally and internationally.

"Many companies today find that simple compliance with environmental regulations is not sufficient. Actions that comply with the 'letter of

**"This public-private partnership will ensure long-term profitability for individual businesses through sound environmental practices,"**

**— Alisa Bailey**

the state are recognizing the importance of a formal Environmental Management System and beginning to offer lower interest loans for voluntary participation," Callaghan concluded.

The West Virginia Division of Tourism responded in equally appreciative terms for Snowshoe's voluntary participation. "Your savvy in participating in this public-private effort bodes well not only for the environment, but also for building a foundation for increasing commerce through tourism. You are demonstrating how a long-term approach of balancing economic development and protection of the environment will result in long-term profitability," wrote former Commissioner of Tourism Alisa Bailey.

"And what better sites for these

pilot projects than at our destinations. Having the thought to assess your business for ways to improve the mental management system to other members of industry. This emphasis is a strong tool for our state's economic development effort continued. "This public

## Houses for



**Brick Ranch near Marlinton.** Located on 1.2 level acres on top of Airport Hill, and has a beautiful view of the local mountains. Newly remodeled 3 BR home has a modern kitchen, living room and unfinished basement. This home is approximately 20 miles from Snowshoe Mountain Resort.

**Yours for only \$89,000.**

See house photos on

COPY

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

ALLYN G. TURNER, DIRECTOR,  
DIVISION OF WATER AND WASTE  
MANAGEMENT, WEST VIRGINIA  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION,

Plaintiff,

v.

Civil Action No. \_\_\_\_\_

SNOWSHOE MOUNTAIN, INC., and  
SNOWSHOE WATER and SEWER, INC.,

Defendants.

COMPLAINT

Plaintiff, Allyn G. Turner, Director, Division of Water and Waste Management, West Virginia Department of Environmental Protection ("WVDEP") alleges that:

Nature of the Action

1. This is a civil action for injunctive relief and civil penalties for violations of the West Virginia Water Pollution Control Act ("WPCA"), West Virginia Code §§ 22-11-1 through -28.

Jurisdiction and Venue

2. This Court has jurisdiction over the subject matter of this action pursuant to W. Va. Code § 22-11-22.

3. Venue is proper in the Circuit Court of Pocahontas County, pursuant to W. Va. Code § 22-11-22, because the Defendants have been and are doing business in Pocahontas County, and because the violations noted herein occurred in Pocahontas County.

### Defendants

4. Defendant Snowshoe Mountain, Inc. ("Snowshoe Mountain") is a corporation organized under the laws of West Virginia that owns and operates two wastewater treatment facilities known as "Snowshoe Village" and the "Inn at Snowshoe." The facilities treat wastewater generated at the Snowshoe resort complex in Pocahontas County, West Virginia.

5. Defendant Snowshoe Water and Sewer, Inc. ("Snowshoe Water and Sewer") is a corporation organized under the laws of West Virginia that owns and operates a wastewater treatment facility known as "Silver Creek." It is located in Pocahontas County, West Virginia, and treats wastewater generated at the Silver Creek Ski Resort.

6. The Defendants are "persons" within the meaning of W. Va. Code § 22-11-3(15).

### Statutory Background

7. Section 301(a) of the federal Clean Water Act ("CWA"), 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into waters of the United States, unless in compliance with various provisions of the CWA. The United States Environmental Protection Agency ("EPA") implements this requirement through a permitting system known as the National Pollutant Discharge Elimination System ("NPDES"). Permits issued by EPA under this system are referred to as "NPDES permits."

8. Section 402(b) of the CWA, 33 U.S.C. § 1342(b), authorizes the Administrator of the EPA to approve a state NPDES permit program which implements and administers the federal NPDES program in a state.

9. The state of West Virginia has been authorized by the EPA to administer the NPDES permit program for discharges into waters within its jurisdiction since May 10, 1982. Pursuant to



W. Va. Code §§ 22-1-5, 22-1-7 and 22-11-4(a)(1), the WVDEP, through the Director of the Division of Water and Waste Management, is the state regulatory agency that administers and enforces the NPDES permit program in West Virginia.

10. Section 8 of the WPCA, W. Va. Code § 22-11-8, prohibits the discharge of any pollutants into waters of the State of West Virginia by any person except, *inter alia*, discharges in compliance with a West Virginia ("WV") NPDES permit issued pursuant to the WPCA.

11. Section 22 of the WPCA, W. Va. Code § 22-11-22, authorizes the WVDEP to commence a civil action for injunctive relief to compel compliance with and enjoin violations of the provisions of the WPCA, or the terms and conditions of any permit granted under the WPCA.

12. Additionally, Section 22 of the WPCA, W. Va. Code § 22-11-22, provides that any person who violates any provision of an NPDES permit issued pursuant to the WPCA is subject to a civil penalty of up to \$25,000 per day for each day of each violation.

#### General Allegations

13. In 2002, the WVDEP reissued WV/NPDES Permit No. WV0023311 to Defendants Snowshoe Mountain, pursuant to Section 8 of WPCA. The permit authorizes Snowshoe Mountain to discharge pollutants from its Snowshoe Village wastewater treatment facility to an unnamed tributary of Cupp Run of Big Spring Fork of the Elk River under the terms and conditions set forth in the permit. A copy of the permit is attached hereto as Exhibit A and incorporated herein by reference. The permit is effective by its terms from February 16, 2002 through January 16, 2007.

14. In December 1998, the WVDEP renewed WV/NPDES General Permit ("General Permit") No. WV0103110. The 1998 General Permit superseded a prior general permit issued in December 1993, which was also designated as General Permit No. WV0103110.

15. General Permit No. WV0103110 authorizes the discharge of pollutants, subject to, *inter alia*, discharge limitations as specified in the permit, operation and maintenance requirements, and monitoring and reporting requirements. It establishes discharge limitations for at least Biochemical Oxygen Demand, Total Suspended Solids, Fecal Coliform, Dissolved Oxygen, Ammonia Nitrogen, and pH for various categories of facilities. A copy of the permit is attached hereto as Exhibit B and incorporated herein by reference. The permit is effective by its terms from January 4, 1999 through December 3, 2003.

16. General Permit No. WV0103110 states, *inter alia*:

This is to certify that any entity to be regulated under the terms and conditions of this general permit, and who has satisfied the registration requirements and has been assigned a Treatment Category, and who has not been required by the Office of Water Resources to apply for an individual WV/NPDES permit, is hereby granted coverage under this General WV/NPDES Water Pollution Control Permit to install, operate, and maintain a disposal system or part thereof, for the direct discharge of treated sewage into the waters of the State.

17. General Permit No. WV0103110 further states that information submitted on and with the Facility Registration/Application Form ("FRF"), related to individual facilities covered by General Permit No. WV0103110, is incorporated into the permit.

18. Pursuant to the required FRF for a General Permit disposal of sewage, the Inn at Snowshoe wastewater treatment facility was permitted under General Permit No. WV0103110 and assigned Registration Number WVG550692. The FRF for the Inn at Snowshoe facility states, *inter alia*, that the facility has been assigned a Treatment Category of IA and that the

immediate receiving stream for the discharge from the facility is Big Spring Run of the Elk River. A copy of the FRF is attached hereto as Exhibit C and incorporated herein by reference.

19. At times relevant to this Complaint, the Inn at Snowshoe treatment facility has been and continues to be covered by General Permit No. WV0103110.

20. In 2000, the WVDEP reissued WV/NPDES Permit No. WV0002937 to Defendant Snowshoe Water and Sewer, pursuant to Section 8 of WPCA. The permit authorizes Snowshoe Water and Sewer to discharge pollutants from its Silver Creek wastewater treatment facility to Black Run of Shavers Fork of Cheat River of the Monongahela River under the terms and conditions set forth in the permit. A copy of the permit is attached hereto as Exhibit D and incorporated herein by reference. The permit is effective by its terms from December 11, 2000 through December 10, 2005.

**First Claim for Relief**  
**(Discharge Limitations Violations)**  
**(Snowshoe Village)**

21. Paragraphs 1 through 20 are realleged and incorporated herein by reference.

22. The terms and conditions of the Snowshoe Mountain permit, WV/NPDES Permit No. WV0023311, limit the discharge of pollutants in the effluent from the Snowshoe Village facility. See Exhibit A. These limitations apply, *inter alia*, to Biochemical Oxygen Demand, Fecal Coliform Bacteria, Ammonia-Nitrogen, Total Suspended Solids, and pH, each of which is a "pollutant" as that term is defined in Section 3 of the WPCA, W. Va. Code § 22-11-3.

23. In February 2003, an inspection conducted by WVDEP revealed that discharges from the Snowshoe Village facility had exceeded discharge limitations contained in the permit for Total Suspended Solids and Ammonia Nitrogen.

24. Additionally, the WV/NPDES permit requires Defendant Snowshoe Mountain report monthly to the WVDEP information regarding its discharges. Reports submitted by Snowshoe Mountain show that discharges had exceeded discharge limitations contained in the permit for the pollutants identified in paragraph 22 above on various occasions during the period from August 2001 through March 2003.

25. Defendant Snowshoe Mountain's failure to achieve the discharge limitations contained in the permit is a violation of the WPCA and the applicable WV/NPDES permit. Defendant Snowshoe Mountain is further liable for any unlawful discharges that have occurred subsequent to March 2003.

**Second Claim for Relief**  
**(Discharge Limitations Violations)**  
**(Inn at Snowshoe)**

26. Paragraphs 1 through 20 are realleged and incorporated herein by reference.

27. In February 2003, Defendant Snowshoe Mountain discharged pollutants in excess of applicable discharge limitations contained in General Permit No. WV0103110, as applicable to the Inn at Snowshoe facility. Discharges of pollutants in noncompliance with a WV/NPDES permit are violations of the WPCA and the applicable WV/NPDES permit.

28. Specifically, Defendant Snowshoe Mountain's discharges of pollutants from the Inn at Snowshoe facility exceeded the discharge limitations for one or more of the following: Biochemical Oxygen Demand, Fecal Coliform Bacteria, and Total Suspended Solids. Defendant Snowshoe Mountain is further liable for any unlawful discharges that have occurred subsequent to February 2003.

**Third Claim for Relief**  
**(Discharge Limitations Violations)**  
**(Silver Creek)**

29. Paragraphs 1 through 20 are realleged and incorporated herein by reference.
30. The terms and conditions of the Snowshoe Water and Sewer permit, WV/NPDES 0082937, limit the discharge of pollutants in the effluent from the Silver Creek facility. See Exhibit D. These limitations apply, *inter alia*, to Biochemical Oxygen Demand, Fecal Coliform Bacteria, Ammonia-Nitrogen, and Total Suspended Solids, each of which is a "pollutant" as that term is defined in Section 3 of the WPCA, W. Va. Code § 22-11-3.
31. The WV/NPDES permit requires the Defendant Snowshoe Water and Sewer to report monthly to the WVDEP information regarding its discharges. Reports submitted by Snowshoe Water and Sewer, as well as an inspection conducted by WVDEP in February 2003, show that discharges exceeded discharge limitations contained in the permit for the pollutants identified in paragraph 30 above on various occasions during the period from January 2002 through February 2003.
32. Defendant Snowshoe Water and Sewer's failure to achieve the discharge limitations contained in the permit is a violation of the WPCA and the applicable WV/NPDES permit. Defendant Snowshoe Water and Sewer is further liable for any unlawful discharges that have occurred subsequent to February 2003.

**Fourth Claim for Relief**  
**(Water Quality Standards Violations)**  
**(Inn at Snowshoe)**

33. Paragraphs 1 through 20 are realleged and incorporated herein by reference.

34. WV/NPDES permits issued pursuant to the WPCA require that a permittee comply with the terms and conditions of the permit. Any permit noncompliance constitutes a violation of the WPCA and the applicable WV/NPDES permit.

35. General Permit No. WV0103110 issued to Snowshoe Mountain and the WPCA provide, *inter alia*, that the permittee's discharges from the Inn at Snowshoe facility may not cause a violation of applicable state water quality standards.

36. In February 2003, Snowshoe Mountain's discharges from the Inn at Snowshoe facility caused a violation of one or more of the following water quality standards: Distinctly visible solids and Deposits or sludge banks on stream beds. Defendant Snowshoe Mountain is further liable for any unlawful violations subsequent to February 2003.

Fifth Claim for Relief  
(Operation and Maintenance Violations)  
(Snowshoe Village)

37. Paragraphs 1 through 20 are realleged and incorporated herein by reference.

38. WV/NPDES permits issued pursuant to the WPCA require a permittee to comply with the terms and conditions of the permit. Any permit noncompliance constitutes a violation of the WPCA and the applicable WV/NPDES permit.

39. WV/NPDES Permit No. WV0023311 issued to Snowshoe Mountain and the WPCA require, *inter alia*, that the permittee properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of the applicable WV/NPDES permit.

40. In February 2003, Snowshoe Mountain failed to properly operate and maintain the Snowshoe Village facility when it failed to calibrate the facility's flow meter, and when it failed

to determine the cause of a spill from certain chlorine contact tanks. Defendant Snowshoe Mountain is further liable for any unlawful violations subsequent to February 2003.

**Sixth Claim for Relief**  
**(Operation and Maintenance Violations)**  
**(Inn at Snowshoe)**

41. Paragraphs 1 through 20 are realleged and incorporated herein by reference.

42. WV/NPDES permits issued pursuant to the WPCA require a permittee to comply with the terms and conditions of the permit. Any permit noncompliance constitutes a violation of the WPCA and the applicable WV/NPDES permit.

43. General Permit No. WV0103110 issued to Snowshoe Mountain and the WPCA require, *inter alia*, that the permittee properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of the applicable WV/NPDES permit.

44. In February 2003, Snowshoe Mountain failed to properly operate and maintain the Inn at Snowshoe facility when it failed to remove solids from the facility, which resulted in the discharge of solids from the facility. Defendant Snowshoe Mountain is further liable for any unlawful violations subsequent to February 2003.

**Seventh Claim for Relief**  
**(Operation and Maintenance Violations)**  
**(Silver Creek)**

45. Paragraphs 1 through 20 are realleged and incorporated herein by reference.

46. WV/NPDES permits issued pursuant to the WPCA require a permittee to comply with the terms and conditions of the permit. Any permit noncompliance constitutes a violation of the WPCA and the applicable WV/NPDES permit.

47. WV/NPDES Permit No. WV0082937 issued to Snowshoe Water and Sewer and the WPCA require, *inter alia*, that the permittee properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of the applicable WV/NPDES permit.

48. Snowshoe Water and Sewer has failed to properly operate and maintain the Silver Creek facility since 1999 by failing to calibrate the facility's flow meter.

**Eighth Claim for Relief**  
**(Operation and Maintenance Violations)**  
**(Silver Creek)**

49. Paragraphs 1 through 20 are realleged and incorporated herein by reference.

50. WV/NPDES permits issued pursuant to the WPCA require a permittee to comply with the terms and conditions of the permit. Any permit noncompliance constitutes a violation of the WPCA and the applicable WV/NPDES permit.

51. WV/NPDES Permit No. WV0082937 issued to Snowshoe Water and Sewer and the WPCA require, *inter alia*, that the permittee properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of the applicable WV/NPDES permit.

52. Snowshoe Water and Sewer has failed to properly operate and maintain the Silver Creek facility since September 2001 by storing sludge at the facility for a period exceeding one year.

**Ninth Claim for Relief**  
**(Monitoring and Reporting Violations)**  
**(Snowshoe Village)**

53. Paragraphs 1 through 20 are realleged and incorporated herein by reference.



54. WV/NPDES permits issued pursuant to the WPCA require a permittee to comply with the terms and conditions of the permit. Any permit noncompliance constitutes a violation of the WPCA and the applicable WV/NPDES permit.

55. WV/NPDES Permit No. WV0023311 issued to Snowshoe Mountain and the WPCA require, *inter alia*, that the permittee record the date, exact place, and time of sampling or measurement for each sample or measurement taken pursuant to the permit.

56. Snowshoe Mountain failed to comply with the requirement in paragraph 55 above when it failed to record the sampling time for the December 2002 Fecal Coliform sample at the Snowshoe Village facility. Defendant Snowshoe is further liable for any unlawful violations subsequent to December 2002.

**Tenth Claim for Relief**  
**(Monitoring and Reporting Violations)**  
**(Lau at Snowshoe)**

57. Paragraphs 1 through 20 are realleged and incorporated herein by reference.

58. WV/NPDES permits issued pursuant to the WPCA require a permittee to comply with the terms and conditions of the permit. Any permit noncompliance constitutes a violation of the WPCA and the applicable WV/NPDES permit.

59. General Permit No. WV0103110 issued to Snowshoe Mountain and the WPCA require, *inter alia*, that the permittee collect, preserve, and analyze all samples in accordance with the latest edition of 40 CFR Part 136.

60. Snowshoe Mountain failed to comply with the requirement in paragraph 59 above when the 3<sup>rd</sup> Quarter 2002 Fecal Coliform sample exceeded the sample holding time pursuant to

# More History

(This readable article was written by Mrs. Reed Davis and read at a recent meeting of the Marion Woman's Club.)

## FIRST HOMES

My information is taken from Rev. Wm. T. Price's History of Pocahontas County, published in 1901 by the Price brothers.

Jacob Martin and Stephen Sewell built the first cabin and lived here in 1750-51. Following a dispute, Sewell moved into a hollow tree located where the James Bear house now stands.

The second home was built about 1800 by Col. Wm. T. Poage, who owned all of Martin's Bottom plantation. His wife was Col. Jacob Warlick's widow. Warlick obtained the land by a grant from England prior to 1776. This house was located on Hamilton field near where the Al Jack home stands. Rev. Wm. T. Price was born there in his grand-father's home in 1830.

Col. Poage built a new home and moved to the present site of the Cal Price and Clyde Moore homes.

The fourth house was the Price homestead built on the west side of the river next to my present home. It was the home of Alley Price, James A. Price and Wood-ward Price. The original chimney and kitchen were restored and built in a modern residence owned by Mrs. Anna V. Hunter—now occupied by the Bob Fitzgerald family.

The fifth home is the one generally known as the first home in Marlinton. The building best known as the old McLoughlin Hotel was the Andrew McLoughlin home until 1890. His wife was Mary Poague Price. The North East Portion has the original log-curved stair case and stone chimney in use in the building now owned by Arden Kilharrow. The next home was built in 1849 by Harrier McLoughlin. It is well known as the Brown Yeager home and stands as a modern residence across the street from the Head Mt. (Marion Moore home).

In 1860 the Toll House was built by Mrs. Margaret Poague Price for the Toll Bridge keeper. The Sam Price home was built in 1880 where the freight depot is now located.

The Sam Gay house stood in 1885 on the west side of the river in Price Hollow near the present residence of our colored friend, Bill Stewart.

In 1890, the Rev. Wm. T. Price was built by himself and sons for a house. It stands as Dr. Norman Price's home. John Moss built a home where the Bank of Marlinton stands. He operated a barber shop there. When Marlinton became the County seat in 1892 many families moved here from Huntersville. Some of the first homes to be built about this time were:

Uriah Bird; Miss Pearl Carter's reconstructed home. S. L. Brown (home located on the corner near John Sydes' street-er. Capt. A. E. Smith home, owned by Eugene Daetwyler. Scott Rucker home, owned by Mrs. Eskridge. Chas. McGill home across the corner from Lock McLintic residence, owned by G. D. Wood.

The Boyd Bartlett home near the Clark Hotel. The King home, occupied by the Richard Currence family. When the brick Court House was built the bricks were burned on Hamilton field. The remaining bricks went into Marlinton's first brick home. It was built by Capt. Smith and is now owned by Geneva, and Arnot Yeager and is occupied by Mrs. Grace Yeager and her son, Arnot.



# Our Army and Navy Boys

George William Duncan, son of Mr. and Mrs. Austin Duncan of Buckeye, belongs to the Navy. His ship is the destroyer Hunt. When the great airplane carrier Franklin was so terribly blown up in Japanese waters the Hunt was one of the ships to render aid, in saving men. The badly crippled carrier did make it back to base to be repaired for to fight again. Here is the word of appreciation from 422 survivors of the Franklin to the men of the Hunt. George William adds this note of interest "In all we had better 750 men to cook for." To the captain and officers, and men of the U. S. S. Hunt: We wish to express our deep appreciation and admiration of your gallant ship and her crew who rescued us from the sea on 19 March 1945.

The speed, efficiency, and precise judgment of your boat crews the men on deck, and your bridge was an outstanding example of splendid seamanship and clear thinking that will never be forgotten by us.

Your doctor and corpsmen were careless and untiring in caring for our sick and wounded, and deserve the highest kind of praise. Their skill and determination will always be an inspiration for us.

Our stay aboard your ship has been most pleasant, and we are also deeply indebted to you for the unselfish manner in which you gave up your bunks and shared your clothing and other necessities. We are proud to have been aboard and to have known you; smooth sailing always.

—422 very grateful survivors of the U. S. S. Franklin.

Dear Kathleen and Tony + Thomas  
Kathleen & Deep  
men was on the  
USS Arrow Bunker Hill  
in those Japanese  
waters the Bunker  
Hill was on  
damaged + so  
many dead sailors  
They called it the  
Hunt ship. and  
in April 14 1945 the  
destroyer Hunt under  
went a particularly strong  
attack by enemy planes  
40 of the planes which  
attacked the American  
ships that day.  
in July 6 1945 - Day  
Kathleen + George  
Duncan were in  
Arrow at the time of  
sunder.

George William Duncan  
was one of the  
USS Hunt  
00-674  
sunder.

The following men who had previously qualified for Navy Service were called for active duty by the Local Board March 13, 1944, for induction at a recruiting station:  
 Paul Patrick Smallridge, Slaty Fork

Otis Sterl Lester, Minnehaha  
 Asa Charles Hill, Cass  
 Lanty Phillips, Marlinton  
 Dale Hunter Gay, Huntersville  
 Thomas Lee Houchid, Cass  
 Lacy Paris Kershner, Spice  
 George William Duncan, Buck-  
 eye

Hubert Homer McCoy, Beard  
 Thomas Moses Moore, Marlinton  
 Johnnie Wade Nelson, Hunters-

Burke Hannah (Cassell), Cass  
 Lyle Duane Kertig, Huntersville  
 James Parker (Gibson), Marlinton  
 Clayton Price Seldomridge, Cass  
 Paul Lewis Sexton, Marlinton  
 Alfred Lewis Jackson, Marlinton

The following, who had previously qualified for Army Service on March 14—  
 Thomas Franklin Mundy, Marlinton

Elmer Lee Tucher, Hillsboro  
 Glen Alonzo Lambert, Arbuckle  
 Harper Hudson Galford, Greenbunk  
 Harold Hunter Eriel, Marlinton  
 Harry Lee Thomas, Buckeye  
 Charles Donald Cassell, Cass

On March 15th—  
 Norman Eugene Wheeler, Marlinton

## MONONGAHELA NATIONAL FOREST

SCOPING DOCUMENT - November 2000

## GYPSY MOTH MANAGEMENT ON THE MONONGAHELA NATIONAL FOREST

### Background and Current Condition

The gypsy moth was accidentally introduced into the Northeastern States in 1869. Since then it has become a major defoliator of hardwood trees. Gypsy moth caterpillars hatch in early spring and begin eating leaves from many species of trees, especially oaks. By mid-July the large caterpillars pupate, or form a type of cocoon, and emerge as adult moths. The moths lay eggs on trees, rocks and other objects. The egg masses overwinter, hatching the next generation the following spring. Hardwood trees whose leaves are almost completely eaten by the caterpillars often produce a new crop of leaves. Although this enables the tree to survive, it weakens it, making it more easily killed by root disease, drought, and repeated attack by the gypsy moth or other insects. Pines and other trees with evergreen needles do not produce a new crop of needles, and can die after one season of defoliation. On the Monongahela National Forest, defoliation occurred in various areas from 1989 through 1995. The Forest Service treated these infestations as described later in this document. During the last 4 to 5 years, heavy defoliation over large portions of the national forest has not occurred, probably because of the presence of a fungus, *Entomophaga maimaiga*, which infects and kills the caterpillars, keeping the numbers of these insects down.

Apparently, although present, the fungus did not prevent severe defoliation this year, nor did it prevent the deposition of eggs to provide next year's crop of gypsy moths. Egg mass surveys of the area around Lake Sherwood, and walk through exams of several areas indicate that large numbers of egg masses are present. These eggs are likely to result in caterpillar populations which will cause heavy defoliation next year, even if the fungus, or other diseases that affect the gypsy moth become more active next year.

The attached maps show the locations of defoliated areas which were mapped during an aerial survey in June, 2000. That survey indicated 42,520 acres within the boundaries of the MNF were defoliated by gypsy moths. Of this acreage, 12,246 acres of National Forest land was heavily defoliated and 8,363 acres was moderately defoliated. An additional 21,907 acres of other ownership lands within the proclamation boundary were also defoliated. Patches were between 40 and 10,000 acres, and some extended as far south as Greenbrier County. In the northern part of the forest, the patches were smaller, and were often surrounded by areas of moderate defoliation, where fewer susceptible trees were completely denuded. In Greenbrier County, where gypsy moth defoliation has not occurred before, all the defoliation noted was heavy. Egg masses have been seen in areas where defoliation was not mapped during 2000, indicating that additional areas can be expected to experience defoliation next year.

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3000

Gypsy moths are spread by people, who transport eggs or other life stages, and by wind, which blows the young caterpillars on silken threads. Gypsy moths are currently spreading to the south and west from the infested area. The infested area includes most counties in the north and east of West Virginia. Of counties within the Monongahela National Forest, only Greenbrier and Nicholas County are not considered to be within the generally infested area.

In areas which experienced heavy defoliation in summer of 2000, heavy defoliation in 2001 may result in tree mortality. The extent of defoliation this year has already affected tree growth and health. If heavy defoliation occurs next year, as expected, tree death will affect recreation developments (like campgrounds), wildlife habitat, forest health, and timber production. Areas with high populations of gypsy moths have more young caterpillars and other life stages which can be spread to un-infested areas.

#### **Development of a Proposed Action to Treat Gypsy Moths - Where do we need treatment?**

In order to develop a Proposed Action for gypsy moth management, factors relating to the expected spread and the extent of damage expected during 2001 were evaluated. The primary predictor of heavy damage for next year would be the number of egg masses found in each area. For general forest areas, greater than 750 egg masses per acre would indicate that heavy defoliation is expected. For campgrounds, picnic areas and developed recreation sites, greater than 250 egg masses per acre would result in visitor contacts with abundant caterpillars and moths, and defoliation weakening or killing trees which could pose a safety threat to people and property.

Although not all egg mass surveys are complete, preliminary surveys indicate that the egg mass densities are very high within the areas of heavy defoliation (up to 18,000 egg masses per acre in the Lake Sherwood Area, for example). Some areas of moderate defoliation have egg mass densities high enough to cause heavy defoliation in 2001. Egg mass surveys will be completed for any potential treatment areas, and final decisions to treat would depend upon the presence of large numbers of egg masses, as well as the evaluation factors shown in the table below.

Refer to the maps for the location of the defoliated areas as listed and described in the table. Big Bend, Jess Judy, and Smoke Hole recreation areas were not within the defoliated areas this year.

## Evaluation Factors Used in Developing the Proposed Action

	Mgmt Areas	Acres Defoliated	1	2	3	4	5	6	7	8	9	10
Potomac RD *	6.2	2400	X	X	X				X		X	X
Potomac RD	6.1 & 3.0	7800	X	X	X				X	X	X	X
Marlinton RD	6.1 & 3.0	8,800	X		X	X			X	X	X	
Greenbrier RD	6.1	600	X	X	X	X			X	X	X	
White Sulphur RD	6.1	920	X		X	X			X	X	X	X
Sherwood Lake-area near Lake	6.1	0			X	X		X	X	X	X	X
Smoke Hole Picnic Area	6.1	0				X	X					X
Jess Judy/Big Bend	6.2 & 6.1	0			X	X	X					X
Seneca Rocks	7.0	24		X	X	X	X	X	X		X	X
Sherwood Lake	7.0	0	X		X	X	X	X				X

\*RD=Ranger District

### Evaluation Factors

1. Heavy defoliation- 2000
2. Moderate defoliation- 2000
3. Heavy defoliation expected- 2001
4. Location on the leading edge of reproducing populations of gypsy moths, indicating potential to spread into un-infested areas
5. Developed recreation sites
6. Developed recreation sites in Forest Plan Management Prescription 7, where the "vegetation will be managed to ensure that the long-term viability, safety, and attractiveness of the area continues throughout the anticipated life of the development."
7. Merchantable timber land affected
8. Management areas where the Forest Plan calls for active timber management
9. Oak mast production affected
10. Visual quality objectives affected by views of dead trees from roads or areas of concern

For all the affected area, resource management will be affected to some extent by the gypsy moth in 2001. Thus the Forest Plan would allow treatment in any of these areas. The Potomac Ranger District is part of the generally infested area, where the gypsy moth is an established pest species. Spraying for gypsy moths would be unlikely to keep this pest from invading other areas. The areas to the south of the Forest, and the areas on the western edge of the Greenbrier RD, however, have potential to allow gypsy moths to spread to additional un-infested areas. The presence of large numbers of gypsy moth caterpillars and moths at Lake Sherwood and at Seneca Rocks indicates potential for recreation traffic to spread the pest rapidly to un-infested areas. The potential for this pest to spread more rapidly was the primary factor in deciding which areas to consider for treatment. Our priority, in keeping with the USDA Final Gypsy Moth Environmental Impact Statement, 1995 (EIS), is to slow the spread of the gypsy moth, thus delaying the onset of defoliation in un-infested areas. The following areas are included in the



proposed action for treatment. Acreage and exact boundaries of treatment areas will vary slightly since egg mass surveys currently being conducted will define the boundaries more precisely.

- Marlinton Ranger District, 9500 acres,
- Greenbrier Ranger District, 650 acres,
- White Sulphur Ranger District, 1000 acres,
- Sherwood Lake, approximately 1000 acres, including 6.1 areas near the Lake which were not defoliated in summer of 2000, and the campground
- Seneca Rocks, 40 acres including the area defoliated last year and surrounding area to make up a minimum sized spray block,
- Jess Judy and Big Bend, 80 acres.

Additional factors which support inclusion of these areas are discussed below.

The heavy defoliation in these areas covers much larger blocks than the general forest areas on the Potomac Ranger District. If heavy defoliation does occur in 2001 as expected, the forest health effects and increased tree mortality will cover more area. It is anticipated that environmental effects of these larger blocks of defoliation will be much greater, in terms of water quality and quantity, fire danger, and effects on wildlife and timber values, than would be the effects in the smaller ridge top patches of heavy defoliation on the Potomac District.

The Forest Plan direction for vegetation management in Seneca Rocks and Lake Sherwood, as quoted in Factor 6, above, indicates that visual quality and attractiveness of these areas is a higher priority than for the general forest area. This is also the case for individual campgrounds and picnic areas. Thus the immediate areas of Jess Judy and Big Bend will be included in the treatment proposal. Preliminary egg mass surveys indicate that most of these areas are slightly below the threshold for spraying (250 egg masses per acre), but caterpillars are very likely to spread by wind from the area of heavy defoliation immediately to the west. Smoke Hole Picnic Area had egg mass counts lower than the threshold and is not in danger from nearby populations to the west, so it is not included for treatment at this time.

The 6.1 area around Lake Sherwood affects the view from the recreation area, and this would have an effect on the attractiveness of the area discussed above. The campground itself has many pine trees, which could die after only one defoliation.

Preliminary surveys in the area on the Greenbrier Ranger District, indicated some plots with high numbers of egg masses in the area of moderate defoliation. Since spread of the insect is our primary concern, this area will be included as well as the adjacent area with heavy defoliation.

Mast production from oak trees will be affected in all areas, but mast production was not a factor in choosing the areas for proposed treatments. Visual quality will be affected to some extent in all areas during the period of defoliation, but only those areas affecting the view, and the recreation experience at Lake Sherwood, Seneca Rocks, and within campgrounds were included in the proposed action for treatment. Choosing not to spray in large areas of the Potomac Ranger District will be likely to result in heavy defoliation, possibly in larger areas than were defoliated

## Development of a Proposed Action to Treat Gypsy Moth – What type of treatment should we propose?

The USDA Gypsy Moth FEIS Record of Decision follows an integrated pest management approach of only considering management of gypsy moth populations when and where they pose a risk to resource values and uses, and allows the use of various treatments, individually or in combination, to manage gypsy moth populations.

The treatment proposed is based on the National Gypsy Moth FEIS which contains three strategies to reduce the adverse effects of the gypsy moth: Eradication, Suppression, and Slow the Spread. Eradication is not being considered here. It is not a reasonable strategy in areas where the gypsy moth is already established, nor in areas where large acreages of reproducing populations are becoming established. Suppression is a strategy to reduce damage caused by outbreaks where the gypsy moth is established. Slow the Spread activities slow the rate at which the insect moves into un-infested areas. Both of these strategies are part of this proposal for the Monongahela National Forest. Both strategies may involve the use of pesticides.

Gypsy moth treatments using pesticides began within the Monongahela National Forest in 1989. The following chart displays an annual breakdown of treatments, which were all applied by aerial spraying, except for the emulsified soybean oil, which was sprayed manually on each egg mass. Forty acres is the minimum acreage which can be sprayed by airplane.

METHOD OF TREATMENT						
YEAR	Bt	GYP	DFB	PF	ESO	TOTAL ACRES
1989	X			X		372
1990	X	X	X			5,200
1991	X	X	X	X		10,000
1992	X	X				9,940
1993	X	X				10,068
1994	X	X				7,673
1995	X	X			X	15,171

**Bt** – *Bacillus thuringiensis*, a biological insecticide containing a bacterium that kills a variety of caterpillars of moths and butterflies. It only affects caterpillars which feed on foliage for up to 14 days after spraying, since it is inactivated by sunlight and exposure to weather after that period. For very high population levels, it may be necessary to spray Bt twice, within a 14 day period.

**DFB** – *Diplolepis*, a biological insecticide containing the naturally occurring gypsy moth parasitic wasp. This disease organism specifically kills gypsy moths, without harming other insects or organisms. It is not related to viruses which cause diseases in humans.

or animals. This substance is very expensive and difficult to produce, thus it is not available for general forest spraying, only for extremely sensitive areas.

DFB – Diflubenzuron, or Dimilin, a chemical insecticide that kills gypsy moths by interfering with growth of the caterpillars. It also can affect or kill the immature forms of some insects, spiders and crustaceans. It persists on vegetation and may remain on leaf litter for a year after spraying. Because of the effectiveness and persistence of Dimilin, only one application is required, even with very high populations. No human health effects are likely from exposure to Dimilin as it is used in gypsy moth projects.

PF – Pheromone flakes, a synthetic version of the gypsy moth sex attractant, used where gypsy moth populations are not high, to disrupt and prevent mating, and thus keep populations very low.

ESO – Emulsified soybean oil, a substance that can be applied directly on each egg mass to prevent hatching. This product has been used in campgrounds where it is practical to find and spray most egg masses. It is not toxic to humans, plants or wildlife with the exception of fish. It should not be applied directly on surface water.

The proposed action will be to use a treatment method that: is available; is capable of suppressing the gypsy moth; can reasonably be applied over the large areas of infestation; and has limited impacts to species other than gypsy moth. Pheromone flakes are only effective on very low populations, and emulsified soybean oil is only practical for use in smaller areas with much lower populations than we have. Thus, these two options are not being proposed for use. Gypcheck would be the least disruptive method, since it affects only gypsy moths, however, it is not generally available. Diflubenzuron, or Dimilin, is more persistent in the environment and affects more species than *Bacillus thuringiensis*, thus Bt is the biological insecticide proposed for use in aerial spraying on the areas, totaling approximately 12,270 acres, listed above and shown on the attached maps. The method of spraying can be expected to involve 2 applications within a 2 week period to each block.

#### **Decision to be made**

The decision to be made is whether or not to implement this proposed action to treat gypsy moths or whether to implement some alternative to this proposed action. This decision will be made through an environmental analysis process.

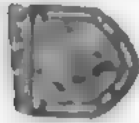
As part of the analysis process, alternatives will be generated based on input received from the public or resource specialists. These alternatives will conform to general direction set forth in the Forest Plan and in the National Gypsy Moth FEIS. The analysis will identify the potential direct, indirect, and cumulative impacts of activities within each alternative. The alternative that best addresses known concerns, including the need to manage gypsy moth, will be identified in a Decision Notice and made available to the public. The Decision Notice will also provide specific direction to ensure compliance with specific resource objectives and all applicable regulations.

## Issues

During the environmental analysis process, the following issues, or others that may arise, may make it necessary to develop additional alternatives. During the development of the proposed action, these issues were recognized and choices were made to minimize any harmful effects.

1. **How would the use of pesticides affect wildlife, livestock, pets or people?** The Forest Plan and the National Gypsy Moth FEIS require that the minimal pesticide dosage and/or least persistent pesticide that will meet project objectives be used. Because the proposed action is to use only Bt or Gypcheck, which are specific to insects and to the gypsy moth, respectively, no harm to mammals, including people, is expected.
2. **Would the project harm birds, amphibians, invertebrates, and/or fish?** Significant effects to these species are not anticipated since Bt only kills caterpillars that are feeding on foliage for up to 14 days following aerial spraying.
3. **Would the project affect threatened or endangered or candidate species or their habitats?** Forest Plan and National Gypsy Moth FEIS standards require that we coordinate with affected agencies to determine that proposed pesticide use will not adversely affect these species. Thus we will coordinate with the US Fish and Wildlife Service, and the WV Department of Natural Resources. As part of the environmental analysis, a biological evaluation (BE) will be done to assess potential impacts on TES species that are or may be in the sprayed area.
4. **Would the project affect water quality?** Neither Bt, nor Gypcheck pose threats to water quality. By keeping trees alive in the filter strips of some streams, water quality could be better with the project, than in areas where gypsy moths are allowed to kill large numbers of trees.
5. **Would the use of pesticides pose any potential human health hazards?** See #1 above. Although these biological pesticides are specific to a small group of insect species, additional precautions would help to avoid any discomfort or concerns due to spraying. Spraying will be done during early May, and recreationists will be warned at affected recreation areas. Low flying aircraft can be considered a hazard, so campsites will be closed during the actual spraying. Signs will be posted at trailheads entering spray blocks, if any. Aerial spraying will be done under weather conditions that minimize spray drift onto adjoining private or other non-target lands.
6. **Would the project maintain Monongahela National Forest visual quality objectives?** Areas of dead trees are expected to be visible next year in untreated blocks on the Potomac Ranger District. The 2 recreation areas under management prescription 7.0, Seneca Rocks, and Lake Sherwood, are expected to have few dead trees to affect visual quality.

7. **Would the project slow the spread of gypsy moths into new areas?** Spread by campers and other recreationists from Lake Sherwood and Seneca Rocks will be minimized. Treatment of recreation areas expected to have high gypsy moth populations will reduce the nuisance to visitors and minimize the chance that visitors may accidentally pick up and transport gypsy moths or their eggs to other forested areas or back to their homes.
8. **Would there be any cumulative impacts associated with the use of pesticides?** Cumulative effects will be analyzed as part of the environmental analysis process. Some private landowners within some of the affected areas are expected to spray for gypsy moths, as are the George Washington and Jefferson National Forests in Virginia. Private landowners could spray with Dimilin or Bt.
9. **Will the project protect the National Forest from defoliation by gypsy moths?** The project would reduce effects on forest health and the number of trees expected to die. The untreated ridgetops and hillsides in the North zone of the Forest, where defoliation was heavy in 2000, would be likely to show abundant tree mortality. Trees that survive and regenerate in these areas will be those less susceptible to the gypsy moth. Areas on the North zone of the National Forest are known to have high levels of the fungus, *Entomophaga maimaiga*, in the forest floor. If weather and other unknown conditions work to enhance the action of this fungus, gypsy moths may be killed and populations of the gypsy moth may decline even in untreated areas. This is unlikely to happen before heavy defoliation has already occurred. In untreated areas with only moderate defoliation last year, fewer trees will die under heavy defoliation conditions this spring. Spraying could be considered for spring of 2002, if warranted at that time.

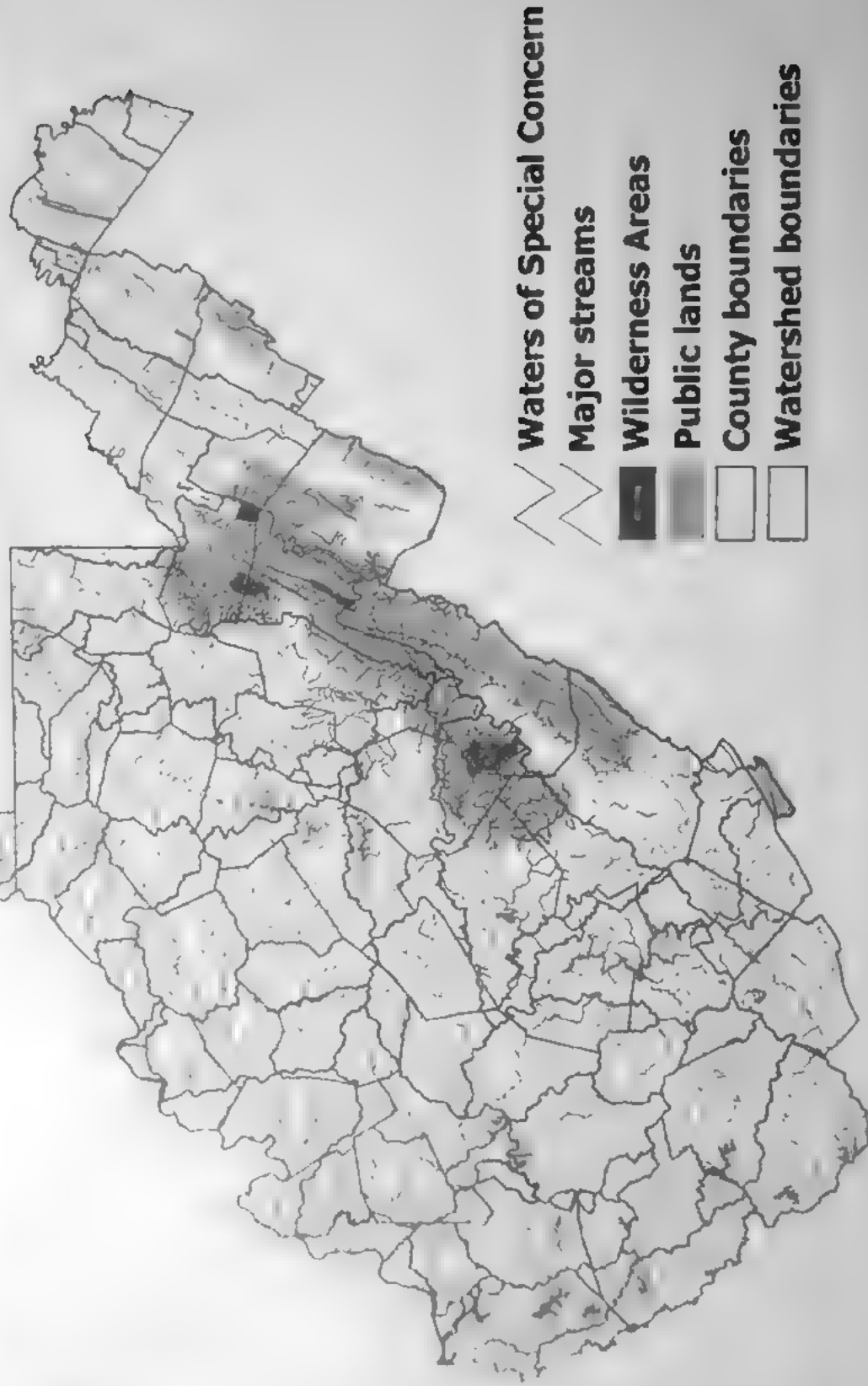


**DEP**

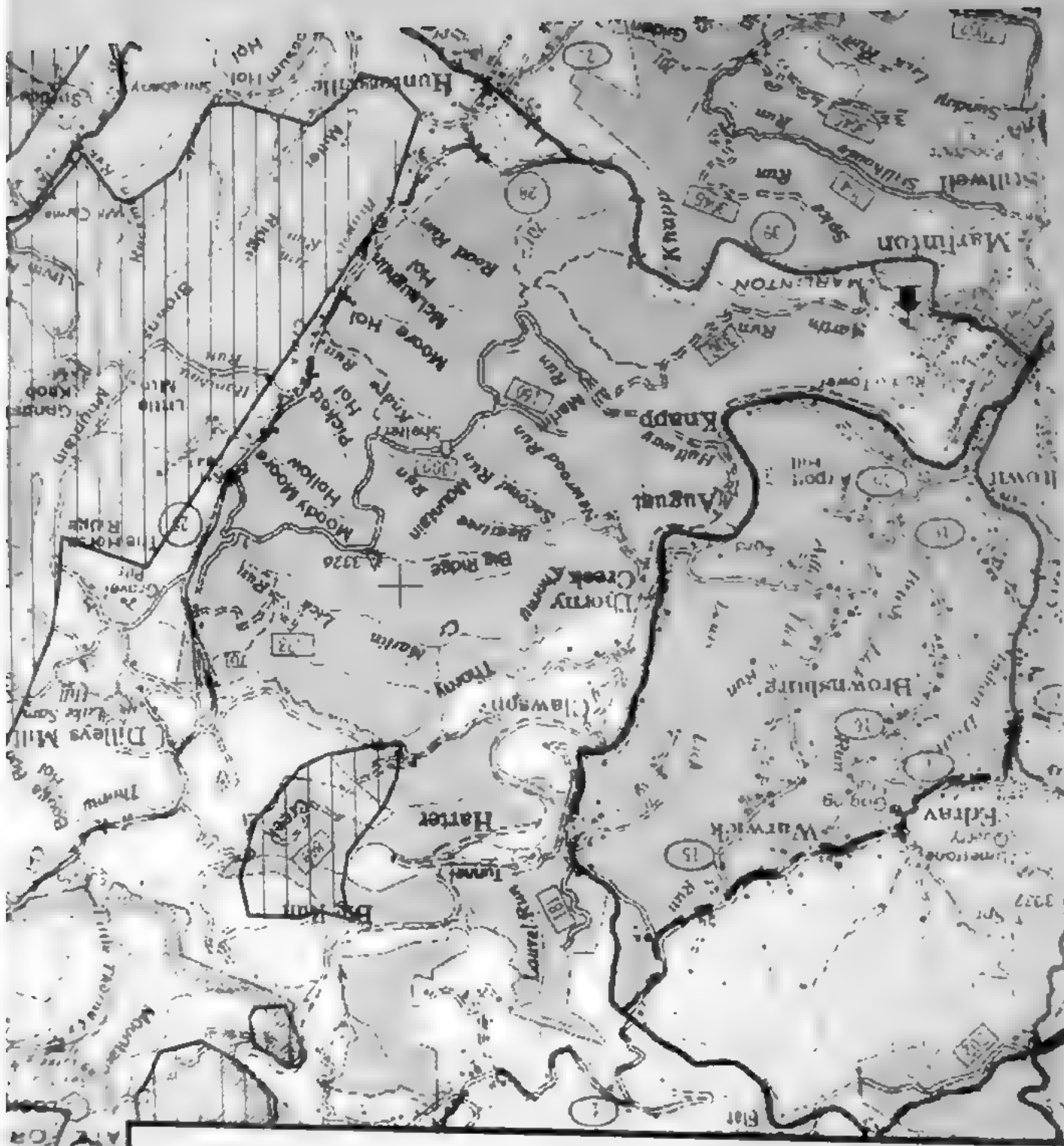
Department of Environmental Protection  
West Virginia

Map of West Virginia  
Showing Waters of Special Concern  
and Watershed Boundaries

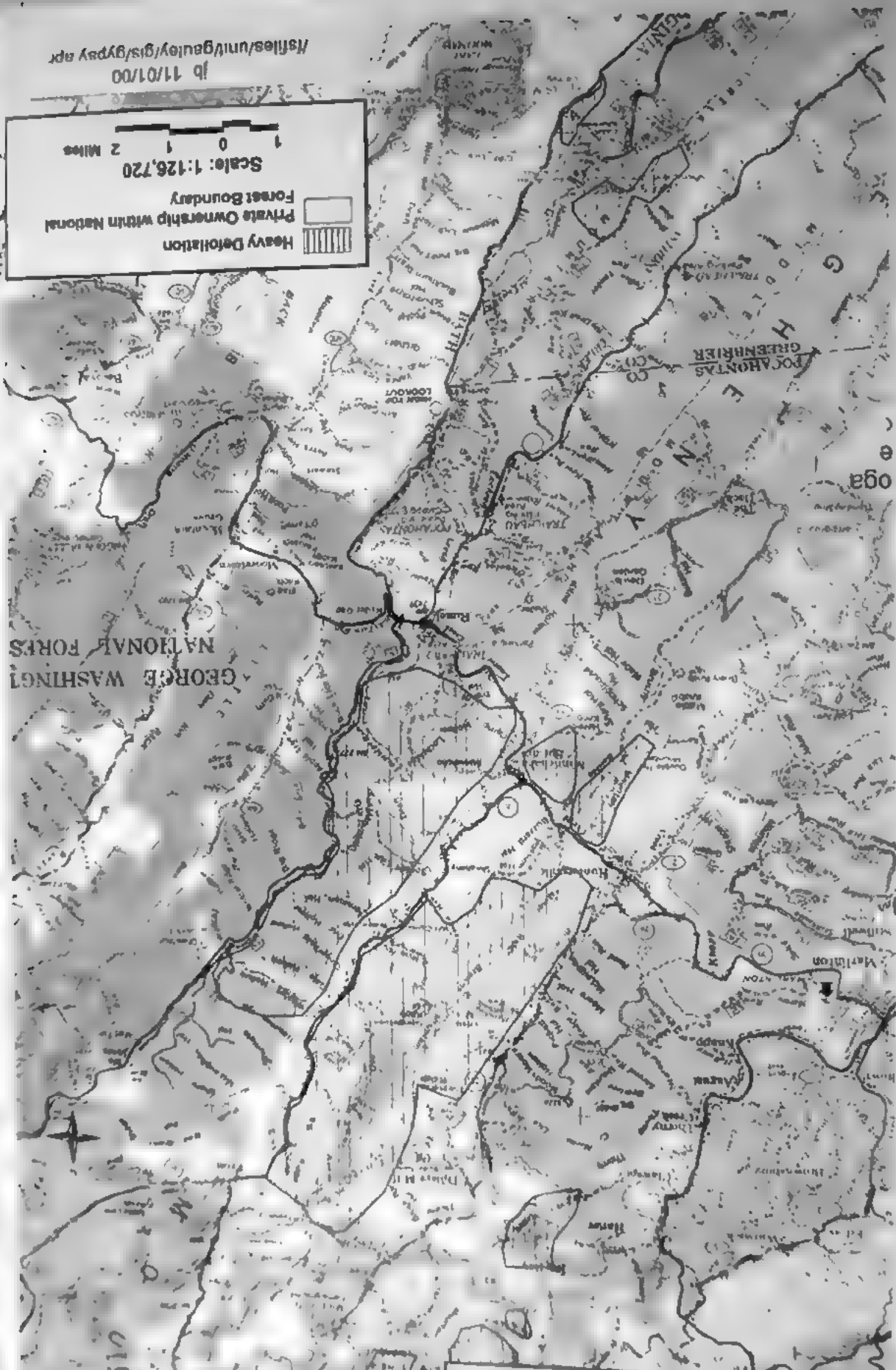
**DRAFT 03/21/01**  
**WV DNR and WV DEP**  
**Waters of Special Concern**



# Gypsy Moth Defoliation 2000 Monongahela National Forest Marlinton and White Sulphur Ranger District



# Map of recent Deforestation 2000 Marlinton and White Sulphur Ranger District



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...back in time several years to  
 "numbering showcase project"  
 "the Rural Safe"

...Curtis

OWER

From A1

Pierce's message said the group was for a "free, strong, proud white America."

A message left for the group's local representative to comment on the sticker was not returned.

The group's Web site contains a variety of essays and other material focusing on white power, including a game.

The ADL said the game is just one example of the group's attempts to recruit young members. The group also has a record label that produces white power music and has held concerts in the Cleveland area in recent years.

Elyria Mayor Bill Grace said putting stickers on street signs is illegal and immediately sent a street city crew to remove the sticker. However, the sticker proved resistant to the crew's knives and scrapers and a can of spray paint could not be used because it was frozen. The crew finally covered the sticker with a

white piece of paper and duct tape.

"It's very disturbing to see such material in the city or anywhere," Grace said.

Beth Wilson, spokesperson for the Ohio Department of Transportation's District 3, said advertisements for everything from weight loss to working from home are commonly found on street signs throughout the state.

"We definitely frown upon and will not tolerate people putting things on the signs," she said. Mayo said the Imperial Klans of America has a chapter in Elyria, founded in 2000, but she said they have not come to the ADL's attention since then.

Elyria police Lt. Daniel Jaykel said he didn't know of any ongoing investigations into racist organizations in the city.

**Contact Bruce Bishop at**

bbishop@chronicletelegram.com or 329-7163. **Contact Brad Dicken at** bdicken@chronicletelegram.com or 329-7147.

"Our initial ...  
 both young people ...  
 "Our initial ...  
 ...this project] ...  
 ...woodworkers ...  
 ...so they can expand their ...  
 ...women who come ...  
 ...businesses ...  
 ...themselves ...

Please let my remarks today in verbal and written form serve as both a formal comment and a formal protest of the Pocahontas County Commission's plan to appropriate Title III money to Pocahontas Woods, Inc., a private non-profit organization composed of representatives of the Pocahontas Board of Education and the Pocahontas County Commission as well as self-appointed members of the private community.

I wish to present my comments and information as a resource to be used to investigate investigate the self-serving, greedy, and inequitable actions of members of Pocahontas Woods, Inc.

Pocahontas Woods as a general concept extends back in time several years to an idea developed by Gibbs Kinderman in which a timbering showcase project was established with a primary location at Slatyfork, WV. This idea eventually died of natural causes only to be revived in 2001 with passage of the Rural Safe Schools and Self-Determination Act.

Around the spring of 2001, several persons got together and formed a private, non-profit corporation to exploit the provisions of the newly passed federal act. Gibbs Kinderman, John Simmons, John Friel, Bernard King, James B. Phares and Ralph Beckwith formed a compensatory corporation called Pocahontas Woods, Inc. using the local physical address of Rt. 1, Box 139, Dunmore, WV which is the same address as another nonprofit group, West Virginia Mountain Radio. WVMR is located on land leased from the Pocahontas County Board of Education.

The mission statement of Pocahontas Woods, Inc. is that it seeks *"to promote the creative and ecologically sound utilization, enjoyment and understanding of the forest resource in Pocahontas County, WV..."*

In a Rural Business Enterprise Grant Application summary submitted 12/31/03 to the Rural and Business Enterprise Agency, Mr. Gibbs Kinderman outlined the primary goals of the corporation:

- "To work on developing a high-end craft wood working industry in Pocahontas County..."
- "...To provide employment for talented young people..."
- "Our initial focus has been on developing a training program for both young people and adults to give them marketable skills..."
- "[With this project] ..."our focus will shift toward working to help current local woodworkers with their financing, marketing, and access to equipment so they can expand their operations and hire the young men and women who come through our training program."
- "To give fledgling woodworking businesses access to equipment they could not afford to purchase themselves, thus making it more

- feasible for them to hire additional help, and providing basic and intermediate training in fine wood working."
- "To develop a shop, office and showroom facility usable for small scale production, training, marketing, and program administration."
- "To develop an organizational structure through which wood crafts men can obtain necessary financing as well as assistance with branding, marketing and quality control and access to equipment..."
- "To develop a training program aimed at providing a skilled work force for this emerging local industry..."

All of these goals and objective are laudable and Pocahontas Woods, Inc. is to be commended for its effort in this regard. I have no heartburn regarding their efforts in these matters.

The rub comes in when Pocahontas Woods, Inc. use the methods of democracy to great a monopoly on public funds. Pocahontas Woods, Inc. is a closed shop. The WV Ethics Commission has ruled that they are a private organization which must not open its doors to the public, post its agenda, or reveal its private funds to the community.

The rub comes in when Pocahontas Woods, Inc. solicits and recruits members in a totally private manner. While it is true that some of the board members are public officials, such county commission president and the school superintendent. Such appointments are merely figurative. Joel Callison, like John Simmons is or has been on the board to insure that at least one vote of the county commission is always in favor of appropriating the Title III money over which the county commission has control. New evidence suggests that Reta Griffith has more than a passing interest in Pocahontas Woods, Inc. The superintendent is appointed so that the Board of Education will allow use of their facilities and not compete with Pocahontas Woods, in rendering educational services to the youth of our county. No representative of the Pocahontas County School Board has actually been formally appointed to this body. In fact, very few people know just who has been representing the school board.

The rub comes in that Pocahontas Woods, Inc. assumes no obligation to insure that discrimination is absent from their organization. It has no anti-discrimination policy. Pocahontas Woods, Inc. has a closed hiring process. Most of their employees have been either Pocahontas Woods Inc.'s board members or employees of the Pocahontas County school system. Is it not surprising that the superintendent, Cable Kinderman, is both the president, the project coordinator, and the superintendent?

It is also interesting that school employee, Joe Riley, and his wife took a week-long trip to Florida for a training session regarding an educational project to be implemented at Pocahontas Woods which will be implemented this fall at PCHS. The project is supposed to be an agricultural business course. Who paid for Mr.

Riley's substitute? Was Mr. Riley paid extra by Pocahontas Woods for that week, was Mr. Riley's regular school salary deducted while he was obviously engaged in a private mission of Pocahontas Woods, Inc. Why Mr. Riley? There are several teachers at the high school who would qualify to teach such a course? The answer is quite simple—Mr. Riley's wife is Sarah Riley, daughter of Gibbs Kinderman.

Gibbs Kinderman, President of Pocahontas Woods and a member of the board is also the Project Director. This seems to allow him to be both the boss and the employee at the same time thereby raising issues of conflict-of-interest. It also seems that John Friel is exercising a conflict-of-interest in that he is both boss and employee. Federal laws generally tend to frown upon such relationships.

Duane Gibson, Building Trades instructor at Pocahontas County High School also serves as an instructor at for Pocahontas Woods. Whether Mr. Gibson is being paid by Pocahontas Woods during his daily schedule as a government instructor is still unresolved at this writing. We shall attempt to clarify these matters which would be an obvious conflict-of-interest and an a serious ethics violation. We do know that Pocahontas Woods was to begin a series of 12 classes on March 8, 2004 at PCHS for students during the first block of each day which is definitely after-school. This means that absolutely none of the Title III money could legally been used for those classes because it is reserved for after-school classes. What we don't know is how Mr. Friel is getting paid. Since Pocahontas Woods, Inc. subsists almost solely from Title III funds, it is important that you investigate this matter. The same Pocahontas Times article also indicates that Duane Gibson, the carpentry teacher at PCHS was also serving as an instructor of the same class. How can this be? Teachers are hired for either a half-day or a full day? What is he doing with his regular obligation during first block?

The Pocahontas County Board of Education appears to have no real idea what was going on. They never approved this course, the objectives, or the instructor, They never approved the use of the shop facilities during the day. County school employees are fingerprinted and must undergo a background check? Did this happen with the adjunct instructor who was using our students, our shop, and other energy resources? How can the board permit an unqualified instructor to teach an unapproved course during the same time when students should be getting regular instruction? Does our board have the foggiest idea what is being done to our schools; it appears that the answer is no!

Who is teaching the class? Mr. Gibson obviously can't be teaching the class because he has a full-schedule of duties to the school system. He has no time during the day when he can lay down his regular work load and supervise a day-class. So who is watching the youth?

You will remember that we uncovered a system at PCHS a couple of years ago in which teachers were selling their Conference & Planning Periods. This is a time during each teacher's day, about 80 minutes long, in which teachers do not supervise students. It is a time when they prepare for their other classes, communicate with parents, do paperwork, and otherwise engage in activities which impact the rest of their schedule.

The usual rate at PCHS is double the hourly rate of pay. One teacher at PCHS was pulling down \$62.96 per hour or about \$90 per day. In actuality they are paid this amount to reward them for neglecting their primary duties to assist with other duties. The means that either teachers don't need a C&P or that they are being paid to neglect one duty while engaging in another.

Our investigation seems to indicate that this same thing might be happening in relation to Pocahontas Woods, Inc. We have reliable information that "double-dipping" is occurring at PCHS with regard to the regular school day. If so, it means that a private organization is paying school staff members to neglect their public duties while performing private duties.

Now Pocahontas Woods proposes to intrude further upon the educational system in Pocahontas County. Pocahontas Woods claims that the Pocahontas County Commission will be providing funding for the shop building on a on-going bases. In the executive summary, a false claim is made that ***"The Pocahontas County Commission has voted to commit 15% of the payment in lieu of US Forest Service Timber Royalty to the Pocahontas Woods project for the fiscal years 2002-2007"*** This is patently false and constitutes a "false claim" to the United States government in light of the fact that there is absolutely no record that the Pocahontas County Commission has made such a commitment for such a period of time. WV law specifically forbids such a long-standing commitment on the part of commissioners. This statement is made to me the sustainability aspects of the grant being sought and it leads the Rural Business Enterprise management officials to conclude that the project has long range sustainability when in reality the funding process is a year-by-year matter capable of being shut down with one vote on any day of the county commission.

Here what our two public bodies have not done in respect to Pocahontas Woods,

- The Pocahontas County Commission has not make a commitment of \$1,000,000
- Pocahontas Woods uses public facilities without permission of the Pocahontas County Board of Education
- Pocahontas Woods uses school equipment without authorization of the Board

- Pocahontas Woods injects instructors into the after-school program which are not qualified.

- The Pocahontas Board of Education has never approved a single after-school program for Pocahontas Woods yet it uses school facilities and equipment.

- The Pocahontas County School System doesn't seem to know where its instructors are: Pocahontas Woods sponsored Joe Riley, and his wife the Ag Instructor, Gibbs Kinderman's daughter, to a week long training session yet the board never approved the trip. Who is paying the cost of a substitute for Mr. Riley. Was his pay deducted for this trip?

- The Pocahontas County Commission has allocated funds for "forest-related after school programs" which are not being used for "after-school" classes.

"Sec. 302. "(a) **Limitation on county fund use.** County funds shall be expended solely on projects that meet the requirements of this title." Public Law 106-393 16 USCS 500

"(b) **Authorized uses:** (4) Forest related educational opportunities. A county may use these funds to establish and conduct forest-related after school programs."

- The Pocahontas County Commission fails to properly exercise its supervisory authority over federal funds in its possess. An on-line presentation indicates three indicators which should be followed carefully.

1 Select your Title III projects conservatively, at least until you feel confident in your decisions.

2 Use detailed and thorough financial accounting regarding those projects

3 Have written justification to document every withdrawal from your Title III account

*WMA Workshop: PL 106-393 and PILT*

Pocahontas Woods, Inc. a current proposal the school system and PCHS in fact are made part and parcel of one whole Pocahontas Woods, Inc. has a new shop on the football parking lot. Never mind that it takes up

an inordinate portion of the public parking space for parking during ball games, it is located on your property.

Now keep in mind, that Pocahontas Woods is a private organization which proposes to build a private building. This organization would totally control access to this building. Without a discrimination policy, they could forbid any person of color, gender, or standing to enter that building.

The reason for the new building is that they have "outgrown" the PCHS workshop. Now wait a minute! The only time that the carpentry workshop is used by the school system is during the daytime. Pocahontas County Woods has obtained \$150,000 of funds earlier and is requesting another \$100,000 from the county's Title III fund which can only be used for "after-school" classes." How can they be running out of space. They certainly don't need any space for "after-school" classes. This is fraud on its face.

Title III federal funds such as those Pocahontas Woods has already received and is currently requesting funds that can only fund "after-school" programs. Why would they need \$250,000 for "after-school" classes? There are not enough youth and adults in Pocahontas County to provide that many classes. In fact, of the first \$150,000 given to Pocahontas Woods, Inc. only \$25,000 has been spent on anything. Sounds a lot like the plan to provide \$30,000 worth of golfing lessons per year on our local 9-hole golfing course!

This year's current budget does call for a few classes, perhaps as much as \$15,000. Of the \$150,000, Pocahontas Woods, Inc. proposes to spend \$2,000 per month on administrative expenses and \$700 per month on travel expenses. What kind of budget is that for "after-school" classes. As far as I know, neither instructors nor students are paid travel expenses to attend class. As far as they students are concerned we have an after school bus which eliminates all travel. Ordinarily public school teachers are given expenses to come to work.

So how can you spend \$700 per month on travel? Furthermore, there are only 20 workdays in a month. This means that there are \$100 worth of administrative costs per day for "after school" classes. This is in addition to the budget allocations for class room costs.

For the current application for \$100,000 more funds for "after school" classes, it is interesting to note that no one dollar is allocated for instruction. Obviously, this is a fraud.

We have obtained the financial records of Pocahontas Woods, Inc. for the last two years. A careful study of that reveals that Pocahontas Woods, Inc. does not keep a separate trail of Title III funds. It is impossible to know which funds are for expenditures versus nonallowable expenditures. Any accountant knows that federal money must be separately accounted, particularly Title III funds.



which have such a limited use. Federal money is not free money. It is money which is raised thorough taxes. It must be accounted for. We demand a separate accounting. Why should you give them more when they won't use what they have responsibly

Let me remind you that Pocahontas Woods was supposed to give quarterly reports, not reports every two years! Make them do it right?

The Pocahontas County Commission will be held accountable for this money. The WV Auditor has pulled the plug on last years' system. No longer will the money be sent straight to Pocahontas Woods, Inc. The money has to come through you. You will be audited for the proper use of this money. I have talked to Mike Parsons and Wayne Kershener and indicated my displeasure with the former method. I am now assured that you will be audited for this money this year. In fact, we are calling for federal auditors to take a special look at the way this money has been handled. You better be very sure that Pocahontas Woods, Inc. is using the money properly or you may be personally responsible for this money.

In fact, you can still save yourself and the county if you act quickly. So far your liability is about \$25,000. As soon as this building is built and the next \$100,000 is spent, it will be too late to save our county from loss. I respectfully ask that you have a federal auditor review the use of these funds before another dollar is spent. I am sure you don't want a half-skeleton of a building broadcasting your irresponsibility to all the citizens who come to football games.

Finally, let me state emphatically that what you are doing is totally unfair to the citizens of our county. We have a right to apply for Title III money; you have a responsibility to allow us that opportunity. I am formally asking for that opportunity. I am pleading with you to let everyone have a chance to use this money for a proper and fitting purpose. I really don't think that is too much to ask.

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

JAMES "JAY" PERRY  
Plaintiff

V. CA No. 01-C-40

TOWN OF MARLINTON  
Defendant

PETITION FOR INJUNCTION  
TO THE HONORABLE JUDGES OF SAID COURT:

I

Plaintiff is a resident, business owner and registered voter in the Town of Marlinton and has an interest in the matters contained in this petition. The Defendant is a municipality in Pocahontas County, West Virginia. The Circuit Court of Pocahontas County has jurisdiction over the subject matter and the parties.

II

This action seeks to obtain temporary and permanent injunctions against the Defendant concerning the recent passage of a municipal service fee ordinance. Plaintiff alleges that the Defendant has illegally passed such an ordinance, and that the Defendant should be enjoined from enforcing such an ordinance. Irreparable harm will come to him, as well as other residents and businessmen in the Town of Marlinton, if this ordinance is not enjoined.

III

On March 22, 2001, and March 29, 2001, the Defendant caused to be published in The Pocahontas Times, a paper of general circulation in the Town of Marlinton, copies of the proposed municipal service fee ordinance in accordance with West Virginia Code 8-13-13. A Postmaster's certificate showing these publications is marked as Exhibit No. 1 and is made a part of this petition. On March 30, 2001, the Town Council of the Town of Marlinton passed the said municipal service fee ordinance. A copy of these minutes is marked as Exhibit No. 2 and is made a part of this petition. Also in accordance with Code 8-13-13 more than 30% of the voters in the Town of Marlinton signed a petition which protested the passage of the municipal service fee ordinance. This petition was presented to the recorder of the Town of Marlinton within 15 days of the expiration of the publication of the ordinance. According to the Code the ordinance does not become effective until voted on and ratified by the voters in the Town of Marlinton. On April 2, 2001, at a meeting of the Town Council it was noted in the minutes that this petition

contained an adequate number of signatures and that the municipal service fee ordinance was inactive until voted on by the citizens of Marlinton. A copy of these minutes is marked as Exhibit No. 3 and is made a part of this petition.

#### IV

Instead of placing the municipal service fee ordinance on the ballot of a regular or special election as is required by the Code, the Defendant "voided" the "old" municipal service fee ordinance and prepared a "new" municipal service fee ordinance. A copy of the May 1, 2001, minutes is marked as Exhibit No. 4 and is made a part of this petition. A copy of the April 20, 2001, minutes which noted the "new" ordinance is marked as Exhibit No. 5 and is made a part of this petition. At a meeting of the Town Council of the Town of Marlinton on May 15, 2001, the Town Council passed the amended municipal service fee ordinance. The new ordinance was published only one time only in The Pocahontas Times in the May 10, 2001, issue. This is in direct violation of Code 8-13-13 which requires two publications. A Publisher's Certificate for this publication is marked as Exhibit No. 6 and is made a part of this petition. A copy of the May 15, 2001, minutes is marked as Exhibit No. 7 and is made a part of this petition.

#### V

Plaintiff contends that the original ordinance is unenforceable because it has not been voted upon and ratified by a majority of the voters in the Town of Marlinton. Plaintiff contends that the second ordinance is unenforceable for two reasons: (1) as an amendment of the first ordinance it needs to be voted upon in the same manner as the original ordinance; (2) the second ordinance was passed by the Town Council after having been published only one time instead of the two times as required by law.

#### PRAYER

WHEREFORE, your Plaintiff prays that the Court issue temporary and permanent injunctions against the Defendant which enjoin the Defendant from enforcing either the first or the amended municipal service fee ordinance, that the Defendant be enjoined that he be granted his costs and fees incurred in prosecuting this matter, and that he be granted such other and further relief as this case and justice require.

JAMES "JAY" PERRY  
By Counsel

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Web posted 07/30/2004  
**Zendik Arts moving from Polk**  
Property to be sold at auction Aug. 14

After five years in Polk County, the Zendik Arts group is moving to West Virginia. Its 102.75-acre property will be sold at auction on Aug. 14.

The group was originally led and its philosophy developed by the late Wulf Zendik, who passed away in 1999. The group's current leader is Aroli Wulfin.

According to Wulfin, Our home (in Polk County) is the most beautiful place on earth you can imagine, pristine creeks, mountain views, historic buildings — it offers a real sense of place, beauty and wonder. The people, our neighbors, are also the best in the world — but, our work is more and more in the metropolitan centers of D.C., New York, Philadelphia and Boston. After much thought, late night discussion and heartbreak, we decided to move closer to these places. Since we've always loved West Virginia and know many people in the area — we will be establishing a new home there.

All of the Zendik Arts property, now being developed as Panther Creek Farms, is expected to be sold at auction on Aug. 14. The property, located on Regan Jackson Road, just past the Lake Adger marina and near the newly begun Bright's Creek Golf Community, consists of 102.75 acres. The land is being subdivided into 14 tracts ranging from 1.05 to 36.61 acres in size. It includes a circa-1800s restored farmhouse, numerous large guesthouses, two barns, a workshop and cabins.

The auction is being handled by Spartanburg-based Carolina Auction Team. Brent Murdoch, senior vice president for business development, is the executive officer in charge of the Panther Creek Farms sale.

According to Murdoch, an open house will be held on the property Sunday, Aug. 8 from 2 to 5 p.m. On August 14, the day of the sale, registration will open at 8:15 a.m., and the sale will begin at 10 a.m. Murdoch says the entire property will sell absolutely to the highest bidder, and there will be no minimum and no reserve.

2003 Tryon Daily Bulletin \* best viewed at 800x600 resolution \* contact us \* make us your start page

ponmaculture.net

Editor  
The Pocahontas Times  
Marlington, W. Va. 24951

Dear Editor:

Last year was the 100th anniversary of the first airplane flight, by the Wright brothers in 1903

In 1927 at the Pocahontas County Fair a pilot named Scotty made his yearly trip to the fair in his biplane named "Scotty's Air Circus". It was one of his several barnstorming trips every year at county fairs, where he would charge each person about \$1 for a short ride. My father, L. D. Sharp, directors of the fair and the pilot knew him. He told Dad that he would give us a thrill. Scotty took us over the hill between the Greenbrier and Knaps Creek in his open cockpit plane and powered the plane downward behind the hill, and I was leaving the seat but held on till he finished the dive. When we landed, Dad told us he was sure we were killed when he saw the plane go out of sight on the dive.

That was my first and last flight. Do I need to tell you why?

Oh yes, Scotty had a jug in the old barn and took a drink between some

flights.

ST. SHARP

My brother's camera took a picture of the plane with him or Henry Gibson in the seat. (maybe not)

Scotty lived in Marlata, Ohio, and two weeks after our flight he flew a stunt under a bridge in Ohio and was killed.

Please correct spelling, and rearrange if necessary.

Dave Sharp  
Cincinnati/Slattery.

I have a few universal Pearl Buck things  
I read the Historical Society file to  
have them if I can find them.  
(add "St. Sharp's" camera)

KNAPP5

11-7-04  
11-7-04

# CALVIN PRICE STATE FOREST

MULTIPLE-PURPOSE

FORESTRY

SO

EVERYONE PROFITS



West Virginia  
DIVISION OF FORESTRY  
State Capitol  
Charleston, WV 25305

and use for, Arnold.

## FOREST PROTECTION

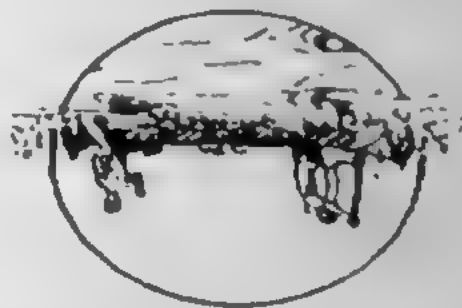
The West Virginia Division of Forestry is the agency charged with the protection of Cal Price State Forest. An increase in commercial and recreational use will increase the risk of damage from fire or over-use, insects and disease, unsafe development, encroachment, and illegal activities are also concerns to be monitored and controlled. Other agencies of State Government share in these responsibilities and all strive for the betterment of Calvin W. Price State Forest.



For more information on Calvin W Price State Forest, contact the West Virginia Division of Forestry at (304) 348-2758

Get home and stands in a modern residence across the street from the Henry and Charles Moore home.

Wildlife considerations are of primary concern when planning and carrying out any activities on the State forest. Sportmen are among the most frequent users of the forest. A wildlife management plan has been developed for Cal Price and is consulted regularly to assist in formulating overall management of the forest.



WATER QUALITY

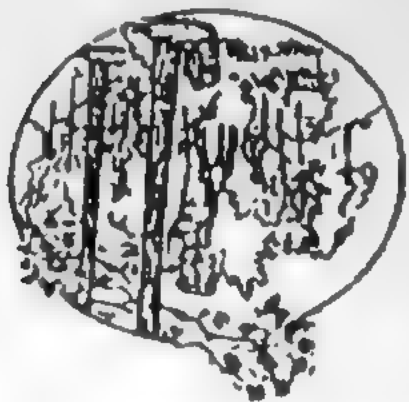
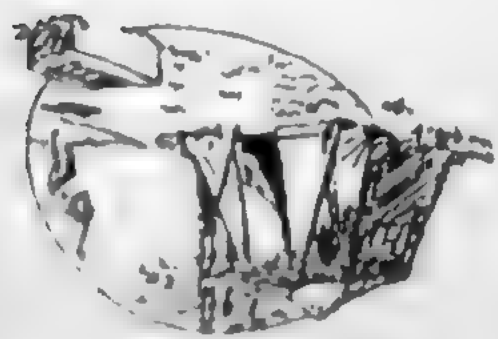
Although fishing opportunities are limited to the Greenbrier River and Laurel Run, the maintenance of water quality is among the foremost missions of management on the forest. The Greenbrier River is recognized throughout the United States as one of the best fishing waters in the East. The entire area of Cal Price lies within the Greenbrier watershed. The forest area is drained by the Greenbrier tributaries of Beaver Creek, Laurel Run, Oldham Run, Perry Run, High Gap Run and Spice Run. Trout are stocked in Laurel Run and bass, catfish and panfish are available in the river.

Cal Price is successfully fulfilling the multiple-use mandate of the State forests by demonstrating techniques that have been developed for managing timber, wildlife, and recreational uses that protect water quality and benefit the aquatic habitat.

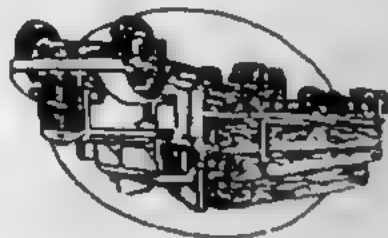


RECREATION AND AESTHETIC APPEAL

Scenic vistas and isolated spots are quite common in West Virginia. Cal Price's rugged State forest serves to ensure that the estimated scenic nature of the forest is inherent with the diverse topography of the Appalachian Mountains. The rugged nature of the area reinforces the isolation which appeals to the adventurous spirit of forest users.



Multiple-use forestry policies provide unique informal outdoor recreational opportunities that cannot be fully obtained on other limited-use public lands. The lack of accessibility limits the variety of recreational uses available on Cal Price, while at the same time contributing to those pursuits which require remoteness and isolation.

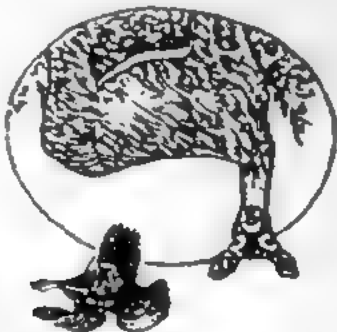


## TIMBER RESOURCES

The timber resource of Cal Price spans a large horn mature to small pole timber stands, with oak-hickory timber through cove hardwoods, and oak-pine to pure white pine stands. Aspect and elevation, as well as timber type, have vast influences on the quality and quantity of the timber on a given site. Prior to severe exploitation of the timber resource in the late 1900's, the Greenbrier River Valley was known for its expanded stands of white pine. Remnant stands remain and are being favored in the current forest management scheme. The majority of this forest is covered with various stages of oak hickory forests. As the need for harvests in these stands is identified, commercial sales are conducted using various harvesting techniques depending on the goals of the multiple-use management plan.



An overall forest management plan is maintained. Timber stands identified for cultural work are intensively surveyed and a prescription is developed to fulfill the management objectives. This work is conducted by professional foresters of the Division of Forestry is designed to implement the multiple-use principles mandated by the legislature.



## WILDLIFE RESOURCES

Cal Price State Forest has a somewhat unique character among State forests. Since Cal Price and much of the surrounding lands were utilized in the same manner and at about the same time there is not as much diversity as would be expected in a comparative area in West Virginia. The habitat conditions and remoteness have thus far been favorable to deer, turkey, bear, squirrel, raccoon and ruffed grouse in varying degrees. The balance of populations will continue to change from species to species as the overall forest continues to mature. Some areas have begun to be skewed by harvests of one type or another. These harvests will increase the diversity of habitat necessary to maintain healthy populations of the various woodland residents of Cal Price. White Watauga and certain portions of the adjoining National Forest are prohibitions of harvesting trees. It falls to Cal Price to provide suitable habitat and diversity for the well-being of the ecosystem.

All state forest timber sales are advertised and to sale. Competitive sealed bids are solicited to ensure that the highest prices available are obtained. Minimum acceptable bids are advertised following an appraisal prepared by Division foresters. Detailed contracts are awarded to the successful bidder and the forester in charge. Before, during and after a timber sale, all activities are conducted with multiple-use goals for the forest in mind.

...as built in  
McLaughlin, Il  
and as a modern  
the street from  
...and her son, Arnot.  
...and is now owned by  
...It was built by  
...Marlin, Ill.  
...and is occupied by Mrs. Yeager  
...Yeager and her son, Arnot.

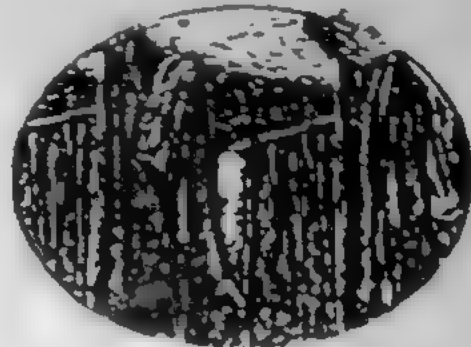


# A MULTIPLE-USE FOREST

(Growing for West Virginia)

## LOCATION

Calvin W Price State Forest is located in southern Pocahontas County and extends slightly into northern Greenbrier County. The forest is on the east side of the Greenbrier River and is bordered on the north by Waioiga State Park and on the south and east by portions of the Monongahela National Forest. Denmar State Hospital and the site of the former Beard Post Office are the only place names situated nearby. Both are on the west side of the Greenbrier River and offer only limited access to the forest via little used roads. Burr Valley, an area of privately owned land lies near the center of the forest. Access is south from Hunker'sville on County Route 21, or east from Hillsboro by way of Seven on Routes 21/3 and 21/4 through Waioiga State Park.



## HISTORICAL BACKGROUND

Cal Price as the forest is affectionately called was the last forest added to the State forest system. The area was purchased from the New River Lumber Company in 1953. It was named in honor of the late Calvin W Price a Meritman.

## MANAGING FOR THE FUTURE

Of the 9,422 acres which comprise Cal Price State Forest, 30 have been developed or are maintained as open areas for camping and picnicking. There are no cabins or stables on the forest. The close proximity of these facilities on Waioiga eliminate the need for them on the State forest area. Hunting and trout fishing are the principal recreational uses of the forest. The primary focus on Cal Price is in the area of forest wildlife and watershed management. Recreation and aesthetics, although not mentioned on Cal Price, benefit by the efforts generated on behalf of the primary management goals. By having policy guidelines clearly set forth in the management plan, each of these valued uses of the forest is guaranteed a place in the future of this forest.



paper editor, prominent citizen and husband of the late Mrs. Price, was immediately initiated. As with all State forests, Cal Price has been given a legislative mandate to develop its timber resource, watershed and provide for public recreation and aesthetics. The results of this approach are evident in the continually developing timber stands present today with continued application of this management philosophy, an increasingly valuable resource should continue to be available indefinitely.

### COUNT THREE

The "Green Box" system employed by the PCSWA violates the provisions of West Virginia Code § 22C-4-10, which requires:

- (a) Each person occupying a residence or operating a business in this state shall either:
  - (1) Subscribe to and use a solid waste collection service and pay the fees established therefore; or
  - (2) Provide proper proof that said person properly disposes of solid waste at approved solid waste facilities *or in any other lawful manner.*

The plaintiffs are denied this right by the PCSWA which does not recognize any manner of lawful trash disposal other than use of the Green Boxes.

### COUNT FOUR

The "Green Box" system employed by the PCSWA violates the provisions of West Virginia Code § 22C-4-8(1)(4) which requires solid waste authorities to establish mandatory garbage disposal programs "which shall include methods whereby residents must prove either: (i) Payment of garbage collection fee; or (ii) proper disposal at an approved solid waste facility *or in an otherwise lawful manner*" (emphasis supplied). The scheme set up by the PCSWA contravenes this statute because there is no provision for residents of the county to dispose of their garbage except by using the facilities provided by the PCSWA. Therefore, they are deprived of their statutory right to dispose of garbage "*in an otherwise lawful manner.*"

### COUNT FIVE

West Virginia Code § 22-15-7 requires that operators of landfills publish a yearly schedule and provide one free day per month for residents to dispose of residential garbage. However, residents of the county are denied access to the landfill entirely if they have not paid the Green Box fee. Furthermore, use of the "free day" for residential garbage is specifically forbidden by the PCSWA's *Litter Control and Solid Waste Management Plan*. This is in direct

contravention of §22-15-7, which states that persons "not in the business of hauling or disposing of solid waste may dispose of, in a landfill, an amount of residential solid waste equal to one pick-up truck load or its equivalent." This procedure would allow residents who generate little trash an inexpensive alternative to the mandatory Green Box fee.

#### COUNT SIX

The defendants County Disposal Service, LLC, James S. Burke and John C. Sharp, D.O., are unjustly enriched by this system. James S. Burke, as a member of the PCSWA has control over the rates that the landfill and the Green Box System charge for use. If the tipping fee at the landfill is increased, then the profitability of his company goes down. The tipping fee at the landfill has never been increased, but the Green Box Fee has increased at least by a factor of four.

Since the Green Box users generate only twenty-five percent of the solid waste that goes to the landfill, but supply over half of the PCSWA's revenue, the county residents who do not have collection service are subsidizing those who do have it, and are subsidizing the cost of operating County Disposal Service, LLC.

#### COUNT SEVEN

The current green box system violates the Equal Protection clauses of the West Virginia and United States constitutions. The fee system creates unreasonable class discrimination and requires one group of county residents to subsidize other groups without any reasonable basis.

## MOTION FOR CLASS CERTIFICATION

The plaintiffs herein move for an order certifying the class of individuals who constitute owners or occupiers of Class II real estate situated in Pocahontas County, but not within the areas within the county where residential garbage collection service is provided.

As grounds for said motion, the plaintiffs aver the following:

The West Virginia Rules of Civil Procedure, Rule 23(a) contains four prerequisites that must be met before the class action may go forward. They are all met in this case:

(a) "[T]he class is so numerous that joinder of all members is impracticable." In this case there are approximately 3500 households affected by the Green Box system all of which have substantially similar claims. It would be a grave burden, if not a practical impossibility, for each one of these households to hire an attorney and sue individually. Furthermore, there would be considerable time and expense of litigating 3500 separate lawsuits.

(b) "[T]here are questions of law or fact common to the class." The central issues in this case are:

i. Whether or not the failure of the PCSWA to provide for other alternatives to the mandatory system violates of State law or the Equal Protection Clause of the Federal or West Virginia Constitutions

ii. Whether or not the PCSWA is acting in violation of State law or the Equal Protection Clause of the Federal or West Virginia Constitutions by unfairly discriminating against this class in proportioning the amount to charge this class and the other county residents for residential garbage collection services and landfill fees

iii. Whether or not the PCSWA is unfairly discriminating against this class and causing them harm from the discrimination

iv. Whether or not James Burks is using his position as a public official for profit via a fee system that benefits him by reducing the costs of operating his own company.

v. Whether or not County Disposal Service, LLC, is unjustly profiting as a result of James Burke's actions on the PCSWA.

vi. Whether or not the lawsuits currently pending seeking to impose the Green Box fee and the statutory penalty should be allowed to continue and whether further lawsuits should be prohibited.

(c) "[T]he claims or defenses of the representative parties are typical of the claims or defenses of the class." All of the issues listed above apply equally to all residents and non-residents of the County who are subject to this fee except for those five cases where collection suits have been filed. However, the residents who have not been sued are still subject to suit if they refuse to pay.

(d) "[T]he representative parties will fairly and adequately protect the interests of the class." The named plaintiffs are aware of their responsibility to ensure that the class as a whole is treated fairly

The plaintiffs further represent that their claim falls within Rule 23(b)(3) of the West Virginia Rules of Civil Procedure. The questions of law and fact predominate of any questions affecting only individual members, and, because of the number of plaintiffs and relative small dollar amount of each claim, a class action is the superior method for fairly and efficient way to adjudicate the controversy.

#### PRAYER FOR RELIEF

WHEREFORE, the plaintiffs, individually and on behalf of others similarly situated, pray for the following relief:

### A. PRELIMINARY RELIEF

(1) An Order enjoining the Pocahontas County Solid Waste Authority from any further legal efforts to collect back-due Green Box Fees and/or filing any new collection suits against any prospective plaintiffs.

(2) An Order staying all pending actions in the Magistrate or Circuit Courts of the Circuit Court of Pocahontas County to collect back-due Green Box fees until such time as the Court can determine the rights of the parties.

(3) An order enjoining the PCSWA or any entity operating on its behalf, from collecting any additional green box fees from any owner or occupier of Class II residential property until the legality and/or constitutionality of the current system can be judicially determined.

### B. OTHER RELIEF

(1) An Order granting the plaintiffs Motion for Class Certification.

(2) An Order declaring the rights of the plaintiffs under West Virginia law regarding use of the landfill free-day.

(3) An Order awarding costs, expenses and attorney fees associated with this litigation.

(4) Damages equal to an amount required to reimburse the class as a whole for the portion of the fees they have paid in excess of the amount of trash they generate.

(5) Compensatory and punitive damages.

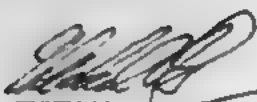
(6) A Writ of Mandamus compelling the PCSWA to perform their non-discretionary duty to develop and implement a garbage disposal system that is fair and equitable and in compliance with the law.

(7) Any further relief required in the interest of justice.

Respectfully submitted,

JEROME E. HEINEMANN,  
PAUL P. HILL,  
GEORGE A. SHEETS,  
HARPER WOLFE,  
LEE J. WOLFE.  
RALPH ROMINE, and  
ROGER W. TETER, SR., individually and  
on behalf of others similarly situated,

By counsel,



John R. Mitchell (2580)  
Michael T. Blevins (7694)  
JOHN R. MITCHELL, L.C.  
206 Berkeley Street  
P. O. Box 353  
Charleston, WV 25322-0353  
(304) 346-0707

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

JEROME E. HEINEMANN,  
PAUL P. HILL,  
GEORGE A. SHEETS,  
HARPER WOLFE,  
LEE J. WOLFE,  
RALPH ROMINE, and  
ROGER W. TETER, SR., individually  
and on behalf of others similarly situated,

JEROME E. HEINEMANN,  
Plaintiffs,

Civil Action No. 01-C- 24

v

POCAHONTAS COUNTY SOLID WASTE AUTHORITY,  
POCAHONTAS COUNTY COMMISSION,  
COUNTY DISPOSAL SERVICE, LLC,  
JAMES S. BURKS, and  
JOHN C. SHARPE, D.O.,  
Defendants,

PLAINTIFF'S FIRST SET OF INTERROGATORIES AND REQUEST FOR  
PRODUCTION TO DEFENDANT POCAHONTAS COUNTY SOLID WASTE  
AUTHORITY

INTERROGATORIES

1 Please identify all bank accounts held by the Pocahontas County Solid Waste Authority including name and address of bank, the name the account is held in, and the account number, and any closed accounts.

ANSWER

2 Please identify all contracts for insurance including the policy number, coverage amount, coverage and insurance company

ANSWER



3. Please identify all witnesses, including names, addresses and phone numbers, who have knowledge of the facts concerning this dispute, and a summary of their anticipated testimony.

ANSWER:

4. Please identify all past and present employees, including board members, of the Pocahontas County Solid Waste Authority including names, addresses, positions, amount of wage or salary, and length of employment.

ANSWER

5. Please identify and describe any effort by any federal or state agency concerning the remedy of any violation of any state or federal statute or administrative regulation. Please include any relevant identification information.

ANSWER:

6. Please describe all lawsuits filed against the PCSWA by any person or entity not included in Interrogatory # 5. For each suit, please provide the following:

- a. Names of the parties.
- b. Case number and date of filing.
- c. Amount of verdict or settlement.

REQUESTS TO PRODUCE

1. Please provide all written, documentary information containing the amount of solid waste accepted by the Pocahontas County Landfill since 1990 by source.
2. Please provide all financial records including tax returns: profit and loss statements; earnings statements; a detailed summary of any holdings, assets or investments; bank statements; and state auditor's reports for the landfill and the green box system since 1990.
3. Please provide copies of all contracts for the provision of services or equipment to the landfill and the green box system since 1990.
4. Please provide all copies of any correspondence, filings, petitions, orders, memoranda and attachments thereto concerning any attempt by the PCSWA to raise the rates for the landfill and/or the green box system filed with any governmental body.
5. Please provide copies of the minutes for all PCSWA board meetings conducted during the last ten (10) years.
6. Please provide copies of all records concerning past due accounts of any person or entity for use of the green box system or the landfill.
7. Please provide a list of all persons who the PCSWA claims are subject to the use of the green boxes.

JEROME E. HEINEMANN,  
PAUL P. HILL,  
GEORGE A. SHEETS,  
HARPER WOLFE,  
LEE J. WOLFE.  
RALPH ROMINE, and  
ROGER W. TETER, SR., individually  
and on behalf of others similarly situated,  
By counsel,



John R. Mitchell (2580)  
Michael T. Blevins (7694)  
JOHN R. MITCHELL, L.C.  
206 Berkeley Street  
P. O. Box 353  
Charleston, WV 25322-0353  
(304) 346-0707

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

JEROME E. HEINEMANN,  
PAUL P. HILL,  
GEORGE A. SHEETS,  
HARPER WOLFE,  
LEE J. WOLFE,  
RALPH ROMINE, and  
ROGER W. TETER, SR., individually  
and on behalf of others similarly situated,

JEROME E. HEINEMANN,  
Plaintiffs,

v.

Civil Action No. 01-C- 24

POCAHONTAS COUNTY SOLID WASTE AUTHORITY,  
POCAHONTAS COUNTY COMMISSION,  
COUNTY DISPOSAL SERVICES, LLC,  
JAMES S. BURKS, and  
JOHN C. SHARPE, D.O.,

PLAINTIFF'S FIRST SET OF INTERROGATORIES AND REQUEST FOR  
PRODUCTION TO DEFENDANT COUNTY DISPOSAL SERVICES

INTERROGATORIES

1. Please identify all bank accounts held by the County Disposal Services  
including name and address of bank, the name the account is held in, and the account number,  
and any closed accounts.

ANSWER:

2. Please identify all contracts for insurance including the policy number, coverage  
type, amount of coverage, and insurance company.

ANSWER:

3. Please identify all witnesses, including name, address and phone number, who have knowledge of the facts concerning this dispute, and a summary of there anticipated testimony.

ANSWER:

4. Please identify all past and present employees, including board members, of County disposal Services including: name, address, position, amount of wage or salary, and length of employment.

ANSWER:

5. Please identify and describe any effort by any federal or state agency concerning the remedy of any violation of any state or federal statute or administrative regulation. Please include any relevant identification information.

ANSWER

6. Please describe all lawsuits filed against County Disposal Services by any person or entity not included in Interrogatory # 5. For each suit, please provide the following:

- a. Names of the parties.
- b. Case number and date of filing.
- c. Amount of verdict or settlement.

## REQUESTS TO PRODUCE

1. Please provide all written, documentary information containing the amount of solid waste taken to the Pocahontas County Landfill since 1990 by source.
2. Please provide all financial records including tax returns: profit and loss statements; earnings statements; a detailed summary of any holdings, assets or investments; bank statements for County Disposal Services since 1990.
3. Please provide copies of all contracts for the provision of services or equipment to the County Disposal Services since 1990.
4. Please provide all copies of any correspondence, filings, petitions, orders, memoranda and attachments thereto concerning any attempt by the County Disposal Services to raise its rates filed with any governmental body.
5. Please provide copies of all records concerning past due accounts of any person or entity for use of County Disposal Service's hauling service.

JEROME E. HEINEMANN,  
PAUL P. HILL,  
GEORGE A. SHEETS,  
HARPER WOLFE,  
LEE J. WOLFE  
RALPH ROMINE, and  
ROGER W. TETER, SR., individually  
and on behalf of others similarly situated,  
by counsel,



John R. Mitchell (2500)

Michael T. Stevens (7004)

JOHN R. MITCHELL, LC

270 Parkside Street

P. O. Box 153

Charleston, WV 25322-0153

(204) 344-0707

working to further the strength of  
Americans of European descent.  
The message urges people to  
visit the group's Web site or  
write for more information about  
its aims. Pierce claims the group  
focuses on working against the  
and immigration Jewish control

National Alliance, read "Earth's  
Most Endangered Species: THE  
WHITE RACE Help Preserve It."  
It encouraged people to write or  
call the West Virginia-based  
group's Parma chapter.  
Marilyn Mayo, associate director

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## White power group's sign seeks to attract new members

**STICKY SITUATION:** Elyria city workers Shawn Wilson, left, and Scott Weber try to remove a sticker from the back of a street sign.

BRUCE BISHOP (CHOCOLATE)

A high-contrast, black and white photograph of a person's face, heavily shadowed and distorted, possibly due to a mask or severe facial injury. The image is framed by a thick black border.

**Bruce Bishop and Brad Dicken**  
**The Chronicle-Telegram**

**ELYRIA** — A large yellow sticker promoting a white power group appeared on the back of a one-way sign at the intersection of state Route 57 and East Broad Street recently, but was quickly covered up when city officials learned of it Friday.

learned of it Friday.

"What makes this group even more dangerous is that they are also interested in attracting young middle-class people. The group shuns the use of obvious symbols like swastikas," she said. The only answer at the phone number advertised by the sticker was a recorded recruiting speech by William Pierce, the group's leader, who said his organization is working to further the strength of Americans of European descent.

The message urges people to visit the group's Web site or write for more information about its aims. Pierce claims the group focuses on working against illegal immigration, Jewish control of the media, globalization, multiculturalism and political correctness.

It encouraged people to write or call the West Virginia-based group's Parma chapter. Marilyn Mayo, associate director of the Anti-Defamation League's National Fact Finding Department, said the National Alliance is "the largest and best organized

the time of day, so I filed another FOIA request, a copy of which is also enclosed.

Also enclosed is Mr. Riley's usual arrogant and dishonest response.

I am sure that you can tell that my frustration with the habits of this Authority is of long standing. For many years I tried to help this body serve the public better by helpful suggestions at its public meetings, and by volunteering to several of the appointing bodies to serve on the Authority when vacancies occurred.

But my attempt now to interest law enforcement in their behavior reflects my reluctant conclusion that Mr. Riley is more interested in empire than in serving the public, and that appointees whom he recommends to the County Commission, the Soil Conservation Service, the Department of Environmental Protection, or the Public Service Commission will never challenge him.

I feel that only indictment or public investigation of the members of the Authority will open it up to citizens who will operate it honestly, openly, and in the public interest.

As I have related, local law enforcement agencies seem unwilling to address this issue. I am appealing to you for help.

Please feel free to contact me about this matter.

Thank you for your patience with this long letter.

Sincerely,

John M. Layzorek  
Route 1  
Marlinton, West Virginia 24954

799-7191

29 JUNE 2001

TO Pocahontas County Solid Waste Authority  
FROM JOHN LEYZORER

PURSUANT TO THE FREEDOM OF INFORMATION ACT AND TO THE WEST VIRGINIA OPEN MEETINGS LAW, I REQUEST ACCESS TO THE TAPE RECORDING OF THE ENTIRETY OF THE AUTHORITY'S MEETING OF 27 JUNE, 2001, PARTICULARLY INCLUDING THE PORTION OF THE MEETING FROM WHICH THE PUBLIC WAS ILLEGALLY EXCLUDED AS A SO-CALLED EXECUTIVE SESSION WITHOUT LEGALLY PERTINENT OR SUFFICIENT REASON UNDER THE LAW HAVING BEEN STATED FOR SAID SO-CALLED EXECUTIVE SESSION. IN THE EVENT THAT TAPE RECORDING WAS NOT MADE OF THIS PORTION OF THE MEETING, I WILL ACCEPT A WRITTEN VERSION OF ~~THE~~ ALL STATEMENTS MADE, QUESTIONS ASKED AND ANSWERED BY ALL PARTICIPANTS OF THIS SAID PORTION OF SAID MEETING, SWORN AND ATTESTED TO BY THE PERSON MAKING THE WRITTEN VERSION.

THANK YOU.



JOHN LEYZORER

# POCAHONTAS COUNTY SOLID WASTE AUTHORITY

900-C Tenth Avenue  
Marlinton WV 24954  
(304) 799-6262

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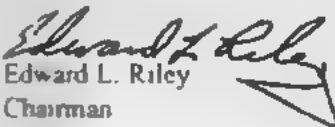
July 3, 2001

John Leyzorek  
Rt 1 Box 248L  
Marlinton WV 24954

In compliance with the Freedom of Information Act the tape recording of the public portion of the meeting on June 27, 2001 will be made available for you to listen to in the offices of the PCSWA. However, the executive session was not taped and no written minutes were taken.

The request for records of the executive session is denied. These records do not exist.

You will need to make arrangements with Connie as to the date and time you wish to listen to the tape.

  
Edward L. Riley  
Chairman



10 AUGUST 2001

from: JOHN LEYZONER  
RT 1 BOX 248  
MARLINTON

Received by  
SWA 8/10/01  
CJP

TO: POCAHONTAS COUNTY SOLID WASTE AUTHORITY

SUBJECT: FOIA REQUEST

DEAR FOLKS:

PURSUANT TO THE FEDERAL FREEDOM OF INFORMATION ACT,  
PLEASE FURNISH ME WITH THE NAMES, ADDRESSES, AND <sup>ALL</sup> OTHER  
CONTACT INFORMATION AND OTHER INFORMATION OF AND ABOUT  
THE CONTRACTORS WHO ATTENDED THE PRE-BID CONFERENCE  
AT THE LANDFILL FOR THE FINAL COVER CONTRACT ON THE  
CLOSE CELL.

I BELIEVE THIS INFORMATION IS ON A YELLOW PIECE  
OF PAPER, RECENTLY IN THE POSSESSION OF MARK KISER OF  
POTERBA & ASSOCIATES.

Thank you.



JOHN LEYZONER

POCAHONTAS COUNTY SOLID WASTE AUTHORITY

900-C Tenth Avenue  
Marlinton WV 24954  
(304) 799-6262

---


August 14, 2001

John Leyzorek  
Rt 1 Box 248  
Marlinton WV 24954

Dear John:

This letter is in response to your Freedom of Information request received in this office August 10, 2001. The request is denied. This record of information does not exist in the office of the Pocahontas County Solid Waste Authority.

Sincerely,

  
Edward L. Riley

SUMMONS

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

JEROME E. HEINEMANN,  
PAUL P. HILL,  
GEORGE A. SHEETS,  
HARPER WOLFE,  
LEE J. WOLFE,  
RALPH ROMINE, and  
ROGER W. TETER, SR., individually  
and on behalf of others similarly situated,

Plaintiffs.

01-C-24

SUMMONS

POCAHONTAS COUNTY SOLID WASTE  
AUTHORITY, POCAHONTAS COUNTY  
COMMISSION, COUNTY DISPOSAL SERVICE,  
LLC., JAMES S. BURKS, individually, and  
JOHN C. SHARPE, D.O., individually,

Pocahontas County Commission  
Marlinton, West Virginia 24954

To the above-named Defendant:

IN THE NAME OF THE STATE OF WEST VIRGINIA, you are hereby summoned and required to serve upon plaintiff's attorney, whose address is Post Office Box 353, Charleston, West Virginia 25322, an answer, including any related counterclaim you may have, to the complaint filed against you in the above styled civil action, a true copy of which is herewith delivered to you. You are required to serve your answer within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for relief demanded in the complaint and you will be thereafter barred from asserting in another action any claim you may have which must be asserted by counterclaim in the above styled civil action.

1000

6-18-01

Earl D. Michael  
Clerk of Court

By: [Signature] Clerk of Court



IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

JEROME E. HEINEMANN,  
PAUL P. HILL,  
GEORGE A. SHEETS,  
HARPER WOLFE,  
LEE J. WOLFE,  
RALPH ROMINE, and  
ROGER W. TETER, SR., individually  
and on behalf of others similarly situated,  
Plaintiffs,

Civil Action No.: 01-C-24

v.

POCAHONTAS COUNTY SOLID WASTE AUTHORITY,  
POCAHONTAS COUNTY COMMISSION,  
COUNTY DISPOSAL SERVICE, LLC,  
JAMES S. BURKS, and  
JOHN C. SHARPE, D.O.,  
Defendants,

COMPLAINT AND PETITION FOR CLASS ACTION AND PETITION FOR  
INJUNCTIVE AND EXTRAORDINARY RELIEF

The plaintiffs, individually and on behalf of others similarly situated, in support of their  
Petition For Class Action and Petition for Injunctive and Extraordinary Relief, do hereby aver  
the following:

PARTIES, JURISDICTION AND VENUE

1 Plaintiff Jerome E. Heinemann, at all times relevant to this action, is a resident of  
Pocahontas County, West Virginia, and a renter of Class II residential property therein, making  
him subject to the laws and regulations at issue herein.

2 Plaintiff Paul Hill, at all times relevant to this action, is a resident of Pocahontas  
County, West Virginia, and a owner of Class II residential property therein, making him subject  
to the laws and regulations at issue herein. Mr. Hill has not been sued, but he has been notified  
that he owes \$200.00 in back Green Box fees for the last seven years. In the last seven years he

has generated two bags of trash. This is a cost of \$475.00 per bag. Mr. Hill is also on a fixed income

3. Plaintiff George A. Sheets, at all times relevant to this action, is a resident of Pocahontas County, West Virginia, and an owner of Class II residential property therein and has been sued by the Pocahontas County Solid Waste Authority for the collection of past-due Green Box Fees, approximately in the amount of \$818.00, Circuit Court Case No.: 01-C-14.

4. Plaintiff Harper Wolfe, at all times relevant to this action, is a resident of Pocahontas County, West Virginia, and an owner of Class II residential property therein and has been sued by the Pocahontas County Solid Waste Authority for the collection of past-due Green Box Fees approximately in the amount of \$612.00, Circuit Court Case No.: 01-C-21. Mr. Wolfe is 89 years old, partially blind and almost completely deaf and on fixed income.

5. Plaintiff Lee Junior Wolfe, at all times relevant to this action, is a resident of Pocahontas County, West Virginia, and an owner of Class II residential property therein and has been sued by the Pocahontas County Solid Waste Authority for the collection of past-due Green Box Fees approximately in the amount of \$1335.00, Circuit Court Case No.: 01-C-22

6. Plaintiff Ralph Romine, at all times relevant to this action, is a resident of Pocahontas County, West Virginia, and an owner of Class II residential property therein and has been sued by the Pocahontas County Solid Waste Authority for the collection of past-due Green Box Fees approximately in the amount of \$612.00, Circuit Court Case No.: 01-C-13.

Plaintiff Roger W. Teter, Sr., at all times relevant to this action, is a resident of Pocahontas County, West Virginia, and an owner of Class II residential property therein and has been sued by the Pocahontas County Solid Waste Authority for the collection of

past-due Green Box Fees approximately in the amount of \$452.00, Circuit Court Case No.: 01-C-16

8. The defendant Pocahontas County Solid Waste Authority (PCSWA) consists of a five-member board and owns and operates the Pocahontas County Landfill within Pocahontas County.

9. The PCSWA also owns and operates a garbage collection system known as the "Green Box" system within Pocahontas County.

10. The defendant Commercial Disposal Service, LLC, is a licensed commercial hauling operator licensed to haul solid waste in Pocahontas County.

11. The defendant James S. Burks owns a one-half interest in County Disposal Service and also is a member of the PCSWA.

12. The defendant John C. Sharp, D.O., owns a one-half interest in County Disposal Service

13. The defendant Pocahontas County Commission is the body responsible for creation, funding and monitoring the PCSWA.

#### STATEMENT OF THE CLAIM

14. In 1986 the PCSWA began operation of a "mandatory garbage disposal program." Under this program, businesses are required to use a solid waste collection service operating in the county or haul their garbage to the landfill and pay the landfill fee. Residents are required either use a solid waste collection service or to pay the mandatory "Green Box Fee." Payment of this fee entitles the residents of Pocahontas County to use of the "Green Boxes," which are dumpsters located strategically throughout the county. Residents of the County that

do not have garbage collection at their homes may, if they pay the Green Box fee, place their trash in the dumpsters for transportation to the landfill.

15. Two commercial garbage collection companies operate within the county—County Disposal Service and Greenbriar Valley Solid Waste. The vast majority of waste hauling in Pocahontas County is handled by County Disposal Service. One-half of County Disposal Service is owned by Jim Burke, who also sits on the Board of the PCSWA.

16. The Green Box fee applies only to Class II property and is mandatory. The bill is mailed yearly with the county tax tickets. At the inception of the system, the fee was twelve dollars (\$12.00) per year. At present, the fee is eighty dollars (\$80.00) per year.

17. The tipping fee at the landfill is forty-eight dollars and seventy-five cents (\$48.75) per ton. This fee has never been increased.

18. There are approximately thirty-five hundred (3500) households in Pocahontas County affected by the Green Box system.

19. Snowshoe and Silvercreek resorts may house up to fifteen thousand (15,000) visitors each day and thousands of people maintain residences on the property that are rented-out by housing associations. None of these persons pay the green-box fee.

20. None of the businesses operating in the county pay the Green Box fee. Instead, they contract with County Disposal Service for transportation of their garbage to the landfill.

21. Current statistical information reveals that the households occupying Class II residential property generate approximately twenty-five percent of the garbage in the county. However, the Green Box system, residents pay up to seventy-five percent of the total fees for the operation of the two enterprises operated by the PCSWA.

22. By statute, landfills are required to provide a "free-day" once a month where residents may dispose of up to one pick-up truck-load of residential garbage without charge. In Pocahontas County, prior to 1998, residents who tried to use the "free-day" were denied access to the landfill unless they had paid the Green Box fee. After 1998, residents were allowed to use the "free day," but they were told that this would not be considered proof of proper disposal to obviate the need for paying the green box fee.

23. Certain county residents refuse to pay the Green Box fee. There reasons vary— Some generate little or no trash and some feel it is unjust for the PCSWA to charge the fee and deny them access to the landfill, some are elderly and on fixed incomes, and some believe that the fee structure creates a disparity which unfairly burdens rural property owners to the benefit of business and municipal residents of Pocahontas County, and some live outside the county and haul their trash out with them PCSWA. These plaintiffs agree that the system is unjust and operates in violation of the law and demand a revised fee system.

24. The PCSWA has begun prosecuting those who refuse to pay the fee. A civil penalty of one hundred and fifty dollars (\$150.00) plus the back due amounts, plus court costs can be imposed on each individual.

25. State statute exempts individuals from solid waste collection fees if they can show proof that they are otherwise lawfully disposing of their garbage. The PCSWA has no procedure in place for residents to provide proof that they are otherwise lawfully disposing of their garbage except for payment of the green box fee.

26. The existing Green Box system and the current solid waste management plan promulgated by the PCSWA are defective under West Virginia Law and are operating in violation of the Equal Protection Clauses of the United States and West Virginia Constitutions.

As detailed more fully below, numerous statutory and Constitutional provisions are violated by this system.

27. Many of the residents of Pocahontas County are low income, elderly individuals, or are otherwise on fixed-incomes who cannot afford to pay the fee. Strong public policy considerations mitigate against this result.

28. Many residents of Pocahontas County generate little or no solid waste or recycle what little they generate. The current system fails to take into account these factors in violation of strong public policy favoring recycling.

#### COUNT ONE—INJUNCTIVE RELIEF.

The PCSWA has begun filing lawsuits in the Magistrate Court of Pocahontas County against households to collect past due Green Box fees. Because of the violations described herein, the petitioners herein request three types of injunctive relief.

- a. An Order enjoining the continuation of the actions to collect past due green box fees until the finalization of this action. T
- b. An Order enjoining the PCSWA from filing any additional suits until the legality of the green box system can be adjudicated.
- c. An order prohibiting the PCSWA from collecting any further green box fees from residents of Pocahontas County

#### COUNT TWO—EXTRAORDINARY RELIEF

The petitioners respectfully request a Writ of Mandamus compelling the PCSWA to develop a green box fee system that complies with the requirements of West Virginia law and the State and Federal Constitutions.



made no effort to reschedule this meeting, and I have not pursued him because I have reason to believe that he is working to protect Mr. Riley, and will not have any more interest in prosecuting the SWA's violations of law now than he did at first.

Another issue with the Solid Waste Authority has arisen since this first story began.

In the Pocahontas Times of 19 July, 2001, a legal advertisement appeared on behalf of the SWA requesting bids for the capping of the closed cell at their landfill. The advertisement stated that sealed bids would be received until 3:00 PM on 31 August, 2001. The advertisement further stated that a mandatory pre-bid meeting would take place at the landfill on 24 July, 2001, at 10:00 AM, and that this meeting was a prerequisite to bidding on the contract.

Five days seemed to me short notice for contractors to respond and attend the meeting, but 31 August not an unreasonable bid deadline.

I attended the pre-bid meeting on 24 July. Mr. Riley was in attendance, a Mark Kiser of the engineering firm that prepared the closure plans, and five or six contractors.

I must interrupt the story to mention that soliciting bids for this job was not discussed by the Authority at their April, May, or June meetings, so it is unclear whether the legal ad of 19 July was an official action of the Authority at all.

At this pre-bid meeting it was stated both orally and in the bid documents for (for which a fee of \$40 was charged) that bids would be received until 3 August, and that they would be opened on the 6th of August.

One of the contractors present objected that receiving all bids several days before opening them looks fishy, and Mr. Riley said that he would look into the possibility of opening them on 3 August, immediately after 3:00 PM.

Sure enough the Authority met on the third of August to open the bids. Ed Riley and Jim Pritchard (County Commission appointee and County Agricultural Extension Agent) were present, along with the Authority secretary. A quorum was sought by getting Jim Burks on the telephone.

Only one bid was received, and opened, and given to the engineer's representative Mark Kiser to evaluate. I asked for, and received a copy of the bid. Mr. Kiser expressed the opinion that the bid seemed a bit high to him.

At this point it seemed very clear to me that the Authority, or Mr. Riley anyway had no intention of making an honest attempt to get a good deal for the public. I had attended the pre-bid conference, and I am an engineer by profession so I am considering submitting a bid myself by the advertised deadline of 31 August to dramatically point out the mess that the SWA has created, but landfills are not my usual specialty, so I thought that I'd like to contact the other contractors who had attended the pre-bid to tell them that opportunity still existed for them to bid.

I knew that Mark Kiser of Poteste & Associates had the list of contractors that had been taken at the pre-bid, so I called him, but he refused to give me the names, saying that I had to speak to Riley. I knew that Riley will not willingly divulge